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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

JAMES LUKIN ROBINSON, Esq.
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL XIII.

CONTAINING THE CASES DETERMINED FROM EASTER TERM, 19 VICTORIA, TO HILARY TERM, 19 VICTORIA: WITH A TABLE OF THE NAMES OF CASES ARGUED, AND DIGEST OF THE PRINCIPAL MATTERS.

SECOND EDITION.

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JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

" ARCHIBALD McLEAN, J.

" WILLIAM HENRY DRAPER, J.

" ROBERT EASTON BURNS, J.

Attorney-General.
Hon. John A. Macdonald.

Solicitor-General. Hon. Henry Smith.



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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH.

IN THE COURT OF ERROR AND APPEAL.

Present—The How the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Draper, the Hon. Vice-Chancellor Esten.

ERROR, FROM THE COURT OF QUEEN'S BENCH.

ABRAHAM K. SMITH, APPELLANT AND DEFENDANT BELOW, V. WILLIAM MUIRHEAD, EXECUTOR OF WM. K. SMITH, RESPONDENT AND PLAINTIFF BELOW.

Debt on annuity bond by executor—Pleas, payment and set off—Replication— Necessity for assigning breaches—Error—Right to take exceptions of which notice not given.

To debt by executor on an annuity bond made by defendant to the testator, and payable during lifetime of testator, defendant pleaded—2ndly, that before the commencement of this suit, to wit, on the 1st of November, he paid to the testator all and every the sums of money which before then were due, &c. To this plea plaintiff replied that defendant did not pay to testator all sums of money at any time before the commencement of this suit due, &c., by virtue of, &c. Defendant pleaded—3rdly, that before the commencement of this suit he owed plaintiff upon the said writing obligatory £35, and that the testator at the time of his decease was, and plaintiff since the death of testator still is, indebted to defendant in £100, for use and occupation, &c., which he offered to set off against the said debt due by him to plaintiff under said writing obligatory. Plaintiff replied to this plea, that he was not nor is indebted mode et formâ

Issue was joined on these pleas.

No breach was alleged in the declaration, nor assigned in the replication, nor suggested under the statute 8 & 9 Wm. III. ch. 11, sec. 8; nor was there an award of venire to assess damages.

The jury found for the plaintiff, and assessed the damages generally.

On error, assigning for errors that the replication to 2nd plea tendered an issue beyond the plea; that there should have been an assignment of breaches or a suggestion under the statute; that there was no issue on which judgment could be given, and therefore there should be a repleader; that the replication to the plea of set off only denied that the plaintiff was indebted, not that testator was, and that this was not cured by verdict—

Held, that the issues tendered by the replications were sufficient, and that the allegations in the pleadings were sufficient to warrant the assessment

of damages.

Quære, whether on the argument, exceptions can be taken, of which no notice has been given.

DEBT by executor on an annuity bond, made by defendant on the thirty-first of July, A.D. 1835, to testator, in a penalty of £500. The condition was that the defendant, his heirs, &c., should, during the life of the testator, pay to him or to his assigns an annuity of £25, payable in equal half-yearly instalments on the first days of November and May in each year. The first payment to be made on the first of November, 1835.

Pleas-1st. Non est factum.

2nd. That defendant did in the lifetime of said W. K. S. (testator), and after the making of the said supposed writing obligatory, and after the said time in the said condition limited for payment thereof, and before the commencement of this suit, to wit, on the 1st day of November, A.D. 1847, pay to the said W. K. S. all and every the sums of money which had at any time before then become due and owing under and by virtue of the said writing obligatory and the said condition thereof: verification.

3rd. That at the time of the commencement of this suit there was due and owing from the defendant to the plaintiff upon the said supposed writing obligatory, by the said condition thereof, for and on account of the said several sums of money in the said condition mentioned, a certain sum of money, to wit, the sum of thirty-five pounds. And defendant further says, that the said W. K. S. in his lifetime and at the time of his decease, to wit, on the 1st day of February, A.D. 1848, was, and the plaintiff, since the death of said W. K. S., still is, indebted to the defendant in a large sum of money; that is to say, the sum of one hundred pounds, for the use and occupation of certain lands, &c., of the defendant, by the said W. K. S. in his lifetime at his request, and by the permission of the defendant, for a long time held and enjoyed, which said sum of money, so due and owing from the plaintiff, or so much thereof as shall be necessary in this behalf, he, the defendant, offers to set off and allow against the said sum of money so remaining due and payable by the condition of the said writing obligatory, according to the form of the statute, &c.: verification.

Replication to 2nd plea-That defendant did not pay to

the said W. K. S. all and every the sums of money which had at any time before the commencement of this suit become due, &c., by virtue of the said writing obligatory and the condition thereof, &c.: concluding to the country.

To 3rd plea—That the plaintiff was not nor is indebted to the defendant in manner and form as the defendant hath above in his said plea alleged: concluding to the country.

There was no breach formally alleged in the declaration nor assigned in the replication, nor any suggested under the statute 8 & 9 Wm. III. ch. 11, sec. 8. No award of venire to assess damages.

Cameron, Q. C., for the appellant, contended that the replication to the plea of payment tendered an issue beyond the plea—viz., for a period between Smith's death and the commencement of the suit: that breaches should have been assigned or suggested under the statute—D'Aranda, executrix, v. Houston, 6 C. & P. 511; Derbishire v. Butler, 5 Moore 198—no sum being mentioned in the plea or replication: that there was no issue on which judgment could be given; therefore there should be a repleader, as the replication to the plea of set off only denies that the plaintiff was indebted, not that testator was.—Kitchingham v. Steel et al., executors, 18 L. J. Exch. 23. This defeat is not cured by verdict.—Jowett v. Spencer, 15 M. & W. 662.

M. C. Cameron for respondent.—There was no necessity to suggest breaches. The record shews what must have been due. The judgment cannot stand for future instalments, for all that could be due under the bond was due when testator died. The issue on payment up to the commencement of the suit, if informal is cured by verdict. As to the plea of set off, the defendant offers to set off the debt due to him by the plaintiff; and so the replication answers all that need be answered. This plea only extends to the debt due by the plaintiff.—Dendy v. Powell, 3 M. & W. 442. The plea admits a debt of £35, and so defendant cannot have judgment; and though the damages may he greater than that sum, this is no reason in this court for reversing the judgment if a good cause of action appear on the record.—Turner v. McNamara, executor, 2 Ch. R. 697. He contended that this case did not come with-

in the meaning of an appeal given by the statute and the rules. Everything will be intended to support a judgment. If the error in pleading be on the part of the defendant, the judgment must stand.—Kempe v. Clews, 1 Ld. Ray. 170.

Cameron, in reply.—The payment pleaded was to testator in his lifetime. The set off must be understood as to the debt due by testator.

ROBINSON, C. J.—The defendant does not in this assignment of error, state his plea of set off accurately; what the defendant had pleaded was, not that the testator at the time of his death, and the plaintiff, as his executor, since his decease, were, and still are, indebted; but, that the testator at the time of his death was, and the plaintiff since the death of the said Wm. K. Smith still is indebted.

We see no ground in this exception for reversing the judgment. It would be of no consequence that the testator owed the £100 for use and occupation, unless the debt continued due at the time when the defendants desired to set it off.—Dendy v. Powell (3 M. & W. 443); that is, at the time pleaded. The defendant therefore properly averred that the plaintiff was at that time indebted to him on account of the use and occupation of his, the defendant's estate, by the testator in his lifetime.

The statute 7 Wm. IV. ch. 3, allows debt to be brought against an executor on the simple contract of his testator, removing the technical objection of wager of law.

Here the defendant offers to set off the debt so due to him by the plaintiff as executor, on account of the use and occupation had by his testator. The plaintiff answers the plea by denying that he is indebted in manner and form, &c., that is, he denies that he owes to the defendant any such debt as the defendant offers to set off.—3 Ch. Pl. 116, 181, 453.

He does not affirm that more was due than the £35 as he might have done, but wholly denies the set off. The consequence of which is, that the plaintiff, in regard to this plea of set off, was estopped from claiming more than £35 as being due to him; but having succeeded on the plea of set off, we cannot notice the admission that would be implied for the

purpose of that plea, as establishing anything against the plaintiff's claim in regard to the other issues—otherwise there would be repugnancy in the plaintiff having judgment as he has for £328.

The issue tendered by the replication, though it takes no special notice of the alleged origin of the debt, yet in substance fully and completely denies the plea pleaded, for it traverses that the plaintiff was, or is, indebted to the defendant in manner and form, that is, on account of the alleged debt due by the testator. We think, therefore, that there was a good issue joined on that plea.

Upon the argument, the defendant's counsel took further exceptions to the judgment, of which he had not even given any notice before the argument, and though it was objected that he could not take any such exceptions, but only those which he had assigned for error.

We have considered them without prejudice, and if we had come to the conclusion that they were in themselves such exceptions as would be entitled to prevail, we must still have considered, before giving effect to them—first, whether we could properly entertain them; and secondly, whether we were bound to do so. Not being of the opinion that the additional exceptions were entitled to prevail, we need not discuss those questions.

The exceptions were, that there is no good issue joined on the plea of payment, and that upon this record there could not legally be any assessment of damages for the court of the assize—and consequently no judgment to recover such damages.

As to the plea of payment and the issue upon it, the defendant himself led to any seeming difficulty, by his new form of pleading. The words "before then," as they stand in the plea, would, according to the natural construction, refer to the day, whatever it might be, on which he made his alleged payment.

Taking them to refer to the commencement of this suit, the assertion would be that, on the 1st of November, 1847, he paid what was due on the 8th of September, 1848. And if we take the 1st of November as not being any certain day

to which he would be confined in evidence on the trial of the issue, then it would mean that on some day before the suit was brought the defendant paid all that was due when the suit was brought: this would seem absurd. Still, if we look at the whole record, it is evident enough that the defendant did in fact mean that, and that he might unexceptionably have pleaded a plea which would have amounted to that in effect.

The annuitant, it is plain, was dead when the suit was brought, because it is his executor who sues. In a certain part of the record the defendant tells us that he had died on the 1st of February, 1848.

The bond and condition set out shew that in that case the payment to be made on the 1st of November, 1847, was the last that could ever become payable; and so it might be in effect true, that on the first of November, 1847, the defendant paid all that was or would be due when this action was brought. If the plaintiff had taken this plea literally in the sense which might most consistently with grammatical construction be ascribed to it, he would have understood the defendant to assert no more than that he did on some day, which might as well be on the 1st of November, 1836, as on the 1st of November, 1847, pay all that was due at the time of his making such payment, which would be an absurd issue to tender in a plea intended to bar all claim under the condition. But the plaintiff did not take the plea in that sense; but says in effect by his replication-"I understand you to mean by your plea that you have paid all that could be claimed in this action as due under the condition; that I deny, and will go to the jury upon it." The defendant, answers in effect,-"I do mean that, and I am ready to maintain it, and will go to the jury upon it."

The defendant sees in what sense the plaintiff has taken his plea and acquiesces in it, and is willing to rest upon that issue, and he could have no doubt what issue had been received, though informally, for the plaintiff's replication is quite explicit.—1 Ld. Ray. 170.

The case of Gwynne v. Burnell et al. (6 Bing. N. C. 453), although a very instructive case on the branch of the law which regards the consequences of immaterial issues, cannot

be taken to apply here against this plaintiff, because in that case there was not only no issue regularly formed by one party offering and the other denying the same; but, if it could have been looked upon that they were at issue, however informally, upon the assertion contained in the last pleading, which was the defendant's rejoinder, yet the court held, what I think was very clear, that a verdict given upon that issue determined nothing that could dispose of the cause.

Now, whether, in the case before us, the defendant, before action brought, paid all that could, at the time of action brought, be claimed under the condition, is so far from being an immaterial issue that it is the very issue which could alone be decisive of the whole action; it was the issue, besides which we must suppose the defendant intended to raise, and believed he had raised, for otherwise his plea could not have barred the action, as he must have intended it to do; and by the event of that issue he was content to abide. After it has been determined against him, he cannot be allowed to tell us that his plea was ill-contrived for raising it, and ought to have been demurred to, or that the plaintiff misunderstood him, and in consequence gave an answer to it which he, the defendant, ought to have demurred to instead of joining issue upon it .- Per Coltman, J., in Gwynne v. Burnell (6 Bing. N. C. 468).

It is plain the parties concurred in going to trial as if they were regularly at issue upon a point both pertinent and necessarily decisive of the action, and all that can be said is, that such issue was not formally joined although it was supposed to be so; and if it was not formally joined, it arose from the plaintiff giving to the defendant's pleas a construction which is not the most obvious, but of, which it may be considered susceptible, and which the defendant probably intended, and by forbearing to demur to the replication and issue upon it, admitted that he did intend.

As to the want of authority to assess damages, no doubt this is a case in which damages require to be suggested under the statute, if they had not been assigned; but we are of opinion that damages were in effect assigned by the pleadings sufficiently to render a suggestion unnecessary, and to limit the recovery to the damages actually sustained. The condition of the bond being spread upon the record, the question is raised by the pleadings, whether it has been fully or finally performed or not, and if not wholly performed so as to bar recovery for anything, then it must follow that the jury might give a verdict for that which remained unperformed, as in other cases where payment is pleaded; and indeed, under the issue on the plea of set off, the verdict being found for defendant, the plaintiff must at least be entitled to damages to the extent which the defendant admitted to be due under the condition, though that, it is true, would not support a right to all the damages recovered.

We are of opinion that the judgment must be affirmed.

THE CHANCELLOR.—I quite concur in the conclusion at which his Lordship the Chief Justice has arrived.

As to the error assigned, the plea of set off alleges, in substance, that the testator at the time of his decease was, and that the plaintiff still is, indebted to the defendant for the use of a certain messuage of the defendant occupied by the testator with the defendant's assent. The indebtedness of the plaintiff, in his representative character, is the proposition advanced by the plea. The form of the allegation is authorized by the statute. The allegation itself is, as it seems to me, directly negatived by the replication; and I am therefore of opinion that the defendant has failed to establish the existence of the error which has been assigned.

With respect to the other errors which were discussed upon the argument, I incline to think, with great deference to the opinions of others, that, upon a proper construction of the orders of this court, counsel ought not to have been heard in support of them. Convenience dictates the conclusion to which the orders, taken alone, seem to me to lead, and which is, I think, strengthened rather than otherwise by reference to modern English practice upon the subject. That point is, however, immaterial in the present case, because the court is of opinion that the defendant has failed to establish the existence of the errors which were suggested.

First, with respect to the replication to the plea of payment,

I am inclined to the opinion that the plea alleges payment of all sums which had become due upon the bond up to the commencement of the suit; and that, upon demurrer even, such would be its proper construction. It is, however, quite capable of this construction. That is the only construction upon which the plea would be a defence to the action, The plain tiff so construed it; and in that sense this replication contains a direct negative of the proposition advanced by the plea. The parties having gone to trial upon this issue, and the jury having found a verdict in favor of the plaintiff, the informality, if indeed any exists, has been, in my opinion, obviously cured.

The objection which was taken upon the alleged absence of any breach, appears to me equally untenable. The only object of the proceedings is to lay a foundation warranting an assessment of damages by the jury. A breach in the form ordinarily employed in pleading is unnecessary; and a reference to the statute, or the assignment of a single breach at least, is not requisite.—Tombs v. Painter(13 East). Here the allegations in the pleadings involve the assertion of a breach, which would not have been rendered more explicit by any formal mode of statement, and is quite sufficient, I think, to warrant the assessment of damages. (a).

I am of opinion, therefore, that the judgment of the court below must be affirmed.

Appeal dismissed.

⁽a) Derbishire v. Butler, 5 Moore, 198; Turner v. McNamara, 2 Chit. 697.

IN APPEAL.

Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor. the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Mr. Justice Sullivan, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge.

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH.

WILLIAM KINGSMILL AND JAMES DAVIS, APPELLANTS AND DEFENDANTS BELOW, V. ISRAEL C. WARRENER AND CALEB WHEELER RESPONDENTS AND PLAINTIFFS BELOW.

Assumpsit on foreign judgment—Jurisdiction of foreign court—Judgment contrary to natural justice—Relation of writ of attachment—Color—Pleading—Demurrer.

Respondents obtained a verdict against appellants in a foreign court in the United States, in trespass de bonis asportatis, and sued on such judgment, in assumpsit in this country. The alleged trespass was committed in this country by Kingsmill, one of the defendants below, in his capacity of sheriff, and in execution of a writ of attachment sued out against one T. an absconding debtor.

The eighth plea set out that defendant King'smill was such sheriff, &c., the warrant of attachment under which, &c., that plaintiffs below claimed, &c., by virtue of a sale made to them after issuing and delivery of said

writ, &c.

Averment, that at the time of attaching and seizing, &c., the property was by the law of Canada in said T., and subject to the said attachment; that defendant was then and always since has been, &c., a British subject, never resided, &c., in the U.S., was never subject to laws of the U.S., for or on account of said causes of action; that by the laws of Canada the plaintiffs had no right of action against the defendants, and that the judgment of the foreign court was contrary to natural justice, &c.

Held, on demurrer, plea bad.

Robinson, C. J, The Chancellor, and McLean, J., dissentientibus.

Semble, per Robinson, C. J., that comity of nations does not extend so far as to render it incumbent on our courts to enforce a judgment against one of their own officers, obtained in a foreign court, for an act done by him under the authority of their process, and that in such a case it is competent for our courts to stay the action on the foreign judgment, and compel the plaintiff to proceed on the original cause of action.

Per Macaulay, C. J., C. P., and Spragge, V. C.—That the fact of defendant's acting in his official capacity makes no difference, and that it would not deprive the foreign court of jurisdiction, or be a reason for refusing

to enforce its judgment in our courts.

Semble, per Robinson, C. J. -That a writ of attachment has relation to the time of its being issued, or perhaps to the teste.

Per Macaulay, C. J., C. P., Burns, J., Esten, V. C., Spragge, V. C.—That it only takes effect from the time of seizure

Per Robinson, C. J., The Chancellor, and McLean, J.—That the statements in the plea of property being in T., that the seizure was legal according to the law of Canada, &c., are positive averments of facts.

Per Macaulay, C. J., C. P., and Spragge, V. C.—That they are not allegations of facts, but merely state appellant's view of the law of Upper Canada.

Semble, per Spragge, V. C.—That where a foreign judgment is attempted to be enforced in the very country where the cause of action arose, it would be competent to the defendant to question the decision of the foreign court on the merits.

Per McLean, J.—That when it is alleged that certain facts were offered, and proved in a foreign court, it will be assumed that the proceedings were

such as to admit of such proof being received.

This was an appeal from a judgment of the Court of Queen's Bench, reported in 8 Upper Canada Queen's Bench Reports, p. 407—Robinson, C. J., dissenting.

It was an action of assumpsit on a foreign judgment,

obtained by the respondents against the appellants.

The declaration stated, "That the plaintiffs recovered a judgment against the defendants in the Court of Common Pleas for the county of Erie, in the State of New York, one of the United States of America, held at the city of Buffalo, in the said county, and within the jurisdiction of the said court, before, &c., judges of the same court duly authorized. &c., as well as a certain sum of, &c., current money of the said State of New York, and equal in value to, &c., current money of this province, for the damages which they had sustained by and on occasion of the committing by the defendants before that time, against the plaintiffs, of certain trespasses—as also the sum of, &c., like current money, &c., and equal in value, &c., current money, &c., for their costs and charges, &c.; which said judgment remains still, &c., in force, &c.; that defendants became and were liable, &c., and, being so liable, promised, &c. Breach.

The only questions on this appeal arose on the 8th plea, which was to the effect that the said judgment was recovered for certain alleged trespasses, alleged by the plaintiffs to have been committed by the defendants in taking and carrying away certain timber in the district of Niagara, in that part of the province of Canada which formerly constituted Upper Canada, alleged to have belonged to the plaintiffs; that the defendant Kingsmill, before the accruing of the said alleged cause of action for which the said judgment was recovered, "was, and from thence hitherto has been, and still is" sheriff of the district of Niagara, in the said province; that before the accruing of the said alleged causes of action for which the said judgment was

recovered, one Henry Tanner, then being an absconding debtor, was indebted to the other defendant, James Davis, in a large sum of money—that is to say, the sum of five hundred pounds of lawful money of Canada, and thereupon the said defendant James Davis, pursuant to the statute in that behalf, caused and procured to be issued out of the Court of Queen's Bench in and for Upper Canada, a warrant under the seal of the said court, signed by the clerk of the Crown, directed to the defendant William Kingsmill, then being sheriff of the district of Niagara, as such sheriff, commanding the defendant William Kingsmill, as such sheriff, to attach and seize, take and safely keep, all the estate, real as well as personal, of said Henry Tanner, being such absconding debtor, of what nature or kind soever, together with all books of accounts, evidences of debt, vouchers and papers relating thereto; and then caused and procured the same warrant to be delivered to the said defendant Kingsmill, as such sheriff, to be executed in due form of law; and that he, the said defendant, as such sheriff, after the delivery of the said warrant to him, and before the return thereof, and while the same was in full force—to wit, on the 20th day of June, 1846—did, within the said district of Niagara, in performance of his, the said Kingsmill's, duty as such sheriff, attach, seize, take, &c., divers quantities of timber, then being the timber of the said Henry Tanner, by virtue of and in execution of the said warrant; that the said plaintiffs at the time of the said attaching, claimed and pretended to own the said timber by virtue of a sale thereof made to them by the said Tanner, after the issuing of the aforesaid warrant of attachment and the delivery thereof to the defendant Kingsmill, and while the same was in full force, and while the said timber was in the said district of Niagara; whereas the said Kingsmill avers that at the time of the said attaching and seizing the said timber was, by the laws of that part of the province which formerly constituted Upper Canada, the preperty of the said Tanner, and subject to such attachment, and that such attaching, seizing, &c., are the taking and carrying away for which the plaintiffs recovered said judgment; that the said alleged causes of action for which said judgment was recovered arose in the Niagara district, in the said province of Canada, and not in the United States of America, where the said judgment was obtained, nor elsewhere out of the said district of Niagara; that at the time of the said action in which the said judgment was recovered was commenced, and at the time of the said taking and carrying away, and at all times before and since, he, the said Kingsmill, was, and now is, a British subject, and at all the said times was, and now is, residing and domiciled in that part of this province which formerly constituted Upper Canada—that is to say, in the said district of Niagara—and never did at any time reside in or was domiciled in the said United States or elsewhere within the jurisdiction of the said Court of Common Pleas; and never was subject to the laws of the United States, for or on account of the said alleged cause of action; that by the laws of that part of the province which formerly constituted Upper Canada, where the said alleged causes of action and every part thereof arose for which the said judgment was recovered, the said taking and carrying away did not, nor does give to the plaintiffs any cause or right of action against him, the said Kingsmill: that he was not liable by the said laws to be prosecuted therefor; that the said Court of Common Pleas, wrongfully, corruptly, and contrary to natural right and justice, although the facts stated in this plea were offered and proved as a defence for the said Kingsmill, at the trial of the said cause for which said judgment was recovered, refused to admit said facts or any of them as a defence to the defendants or either of them, and declared and adjudged that said Kingsmill could not defend or justify himself thereby, or by his position or duties as such sheriff, under said attachment, and that the claim of the plaintiffs to such timber was not and could not be affected by such attachment, or by the facts stated in this plea, the plaintiffs not being British subjects, nor domiciled in Canada, and not affected by the laws of Canada aforesaid, although it was proved at such trial that the said Henry Tanner and his property were subject to such attachment, and said timber was within said sheriff's bailiwick, and was levied thereon according to the laws of Canada aforesaid: verification.

Demurrer—assigning for causes, that the pleadings in said action ought to have been set out in said plea; that it does not appear in said plea that said Kingsmill had pleaded any such defence as he offered to prove, nor that he refused to submit himself to the jurisdiction of the said court, and abide by the judgment thereof, and in other respects, &c. Joinder in demurrer.

The case was argued on the 26th of June, 1851, by Hagarty, Q. C., and Vankoughnet, Q. C., for appellants; and by Cameron, Q. C., for respondents.

On the 26th of February, 1852, it was ordered to be again spoken to, and on the 11th of March, 1852, was accordingly argued by *Vankoughnet*, Q. C., for appellants; and by *Cameron*, Q. C., for respondents.

The judgments entirely embrace the arguments of counsel on either side.

ROBINSON, C. J.—Having still the same opinion of this case which led me to differ from my brother judges in disposing of it in the court below, my judgment is in favor of the appellants.

The reasons of my opinion have been already given; but the case is one of interest and importance, and has been twice argued here. The argument in appeal has been confined to the 8th plea.

I consider that none of the causes of demurrer to that plea which have been specially assigned are tenable, and I am not aware that any of my brothers are of a different opinion in that respect. Then, in regard to any other objections that may be urged, we have to consider whether they are fatal objections upon general demurrer—for if not, then we must give judgment, "according to the very right of the cause, without regarding any imperfection, omission, or defect in the pleadings, so as sufficient matter appear in the pleadings upon which the court may give judgment according to the very right of the cause."

If what is stated in this plea would bar the action in case it were proved, these same things, being admitted by the plaintiffs when they demur, must equally bar their action and upon the demurrer the plaintiffs must be taken to admit all matters that are well pleaded; that is, well pleaded in point of substance, where no available exception has been taken to the form of the plea. Now here the defendant is sued in assumpsit upon a judgment of a local court in a foreign country; that is, upon a judgment of the Court of Common Pleas in and for the "county of Erie, in the State of New York, one of the United States of America." From the style of the court, we may suppose it to be one of local jurisdiction, in a particular county of the State of New York, not a court of superior jurisdiction, having authority coextensive with the State.

The declaration gives no other information of the cause of action, on which this judgment was obtained, than by stating that the recovery was "for the plaintiffs' damages, which they had sustained by and on occasion of the committing by the defendants before that time of certain trespasses against the plaintiffs, and the plaintiffs declare against the defendant Kingsmill, as being sheriff of the district of Niagara, in this province, laying their venue in the district of Niagara.

The eighth plea, of which the sufficiency is in question, states in substance, as the sheriff's defence, that the judgment which was recovered against him in the Court of Common Pleas in the county of Erie, in the State of New York, was in an action of trespass brought against him in that court, for taking a certain quantity of timber in the district of Niagara, in this province, of which district he was, and still is sheriff; that before the action was brought a writ of attachment from the Court of Queen's Bench in Upper Canada had been delivered to him, as sheriff, to be executed, commanding him to attach and seize the real and personal property of one Tanner, an absconding debtor; that under that writ, and while it was current, he did seize certain timber belonging to Tanner within his district, as commanded by the writ, which is the act of trespass complained of, and for which act of duty, performed by him in obedience to the writ, an action of trespass was brought against him and judgment recovered in the Court of Common Pleas of the county of Erie, in the State of New York, at the suit of these plaintiffs, who pretended to own the timber by virtue of an assignment made to them by the said Tanner after the writ was delivered into his hands. He avers, that the timber, at the time that he seized it, was the property of Tanner, and was subject to the attachment; that when the action was brought against him in the Court of Common Pleas of the county of Erie, in the State of New York, and when he seized the timber, and always before and since, he was and is a British subject, and at all times was and is residing and domiciled in the district of Niagara, in Upper Canada, and never at any time resided in or was domiciled in the United States, or within the jurisdiction of the said Court of Common Pleas, and never was subject to the laws of the United States (he should have rather said the laws of the State of New York) for or on account of the alleged trespass.

He says further, that by the Laws of Upper Canada within which he made the seizure, such act gave no right or cause of action against him; in other words, that it was legal, and not a trespass; but that the said Court of Common Pleas of the county of Erie, although the facts now stated by him were offered and proved as a defence at the trial of the cause, wrongfully, and contrary to natural right and justice, refused to admit them as a defence, and adjudged that he could not justify or defend himself thereby; and that the claim of the plaintiffs could not be affected by the attachment, or by the facts stated by him, because the plaintiffs were not British subjects, nor domiciled in Canada, and were not affected by the laws of Canada, though it was proved at the trial that the absconding debtor, Tanner, and his property were subject to the attachment; that the lumber was within his, the sheriff's bailiwick, and was levied on according to the laws of Canada.

Now, before examining the sufficiency of this plea, in reference to the technical rules of pleadings, we are to consider, that if the facts were such in substance as this plea states, then the sheriff acting within his proper district in this province in the execution of legal process, issued from the Superior Court, and under the authority of a statute, seized certain goods as being the property of the person

whose goods he was commanded to seize, and that these plaintiffs claimed them to be theirs under an alleged assignment made by the absconding debtor. This was then one of those cases, as we may suppose, in which the sheriff, in the discharge of his duty, is frequently called upon to determine, whether upon the facts appearing before him it is legal and proper that he should proceed to seize and detain the goods for the benefit of the plaintiff in the process, notwithstanding some claim which is made to them; or whether, treating the claim as well founded, he shall give way to it, and abstain from seizing. We know how perplexing a part of a sheriff's duty it often is to determine in such cases what course he ought to follow. The attempts to evade process by colorable assignments are but too frequent, and sometimes when these are in truth most fraudulent, they are nevertheless so artfully contrived as to make them appear perfectly fair and real. This, for all we know, may have been no case at all of that kind, or it may have been one of the worst. We know only that such cases are constantly happening, and that the sheriff requires in them all the protection which the courts whose process he has obeyed can properly extend to him. In this case, the sheriff, in his view (as we must suppose) of his duty, enforced the process against the goods in question, and did not give way to the claim. If he had decided the other way, and the plaintiff in the process had felt himself aggrieved, he could have taken his remedy by suing the sheriff in an action on the case for a false return, and for refusing or omitting to take the goods in question; but the sheriff having decided against the claim of these plaintiffs, they have taken their remedy (the proper one, if any wrong has been done to them), by suing him in trespass. I mean the proper remedy as regards merely the form of action, being in trespass and not in case. But, whether the question were presented in one form of action or the other, it would be substantially the same in either-namely, whether the sheriff of the district of Niagara, acting within his bailiwick, in execution of the process of the Court of Queen's Bench, had done only what was right, or had

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committed a wrong; and if we acknowledge that any court, and especially a mere local court of a foreign country, can be a proper tribunal for trying that question in an action of trespass, I conceive that we must hold that it would have been an equally proper tribunal for trying the same question in an action against a sheriff of this province for a false return, if he had decided the other way and had abandoned the seizure. I still am of opinion that it is not the proper tribunal-by which I do not mean that the foreign court in this case did anything that was wrong in entertaining the action, for that would depend on what was before them, and on what their own line of duty, under their own laws, made it incumbent upon them to do, or at least competent to do-I mean rather to say, that it is still my impression, after the further discussion which this case has undergone, that whatever the authority committed to the Court of Common Pleas in the county of Erie, by the laws of the State of New York, may enable them to do, so far as the obligation of those laws extends, and however inevitable it may be that the sheriff, who is thus called to account there for an act committed in this province, must abide the result, so far as it can be made to affect his person or property within the jurisdiction of their laws, yet that the courts of justice in this province should look upon the matter as drawn from its proper jurisdiction, when they find their officer compelled to answer in a foreign court for an act done under authority of their process. reasons and on grounds which I have already stated in another place, I think the comity of nations does not extend so far as to compel us to enforce the judgment of a foreign court upon a cause of action of this description, and more especially when that foreign court is not merely foreign in the sense that the court of any colony or country under the British Crown would be rightly called foreign, because out of our jurisdiction; but foreign in this larger sense, that there is no higher tribunal to which we both own a common duty, and which, acting under an authority which corrects and controls us all, can be looked to for protection ultimately against injustice. My doubt is, to speak in no stronger terms, whether there is an implied assumpsit upon the defendant in

such a case as I have supposed, to pay the money awarded by the judgment of a foreign court, on such a cause of action; and I have still a strong impression, that upon a sheriff who finds himself thus attacked, placing before the Superior Court in this province, without unnecessary or unreasonable delay, such statements as would shew the action to be one of this description, and if his statements should stand uncontradicted, he would have a strong claim upon the court to interpose for his protection, by staying any action upon the foreign judgment, and obliging the plaintiff to take his remedy more directly by an action in our own courts against the public officer. If the sheriff had withdrawn himself from this country, and had gone to reside in the state of New York, so that he must be either made amenable to the courts of that state, for any alleged wrong done by him here, or there could be no redress, the case would be different; but when he has always since continued in this province, openly discharging his public duties, and responsible to the laws by which it is clear he should be judged-and to the courts whose process he is in fact, though not directly, charged with abusing—there is no hardship or injustice in our declining to assume anything against him, in consequence of the foreign judgment passed upon his official act committed here; and I cannot but think it due to his protection that we should free him from any disadvantage of that kind. We clearly by such a course should do the plaintiffs no wrong, for they had no pretence even of convenience, for drawing the case from its proper jurisdiction; and if they imagined that they might gain an advantage by doing so, in regard to the principles, laws or feelings, which would guide the decision, that would be an advantage gained at the expense of justice; and it would be a purpose to which it surely cannot be incumbent upon us to lend our aid.

Then as regards any consideration on public grounds, of the respect due to the judgments of foreign courts, there is no doubt as to what the comity of nations authorizes and requires in that respect, so long as there is nothing to shew (which in the declaration in this case there is not) that the judgment is not an action for a matter, and between parties, over which the court which rendered it may be assumed to have had jurisdiction; but when it has been made sufficiently to appear to us that the action is upon a cause of action arising in this country, and of such a nature as I have described, and that the defendant has been all the time resident in this province and amenable to its laws, we should, I am convinced, incur no charge of want of reasonable deference to the comity of nations, in holding the complainants to the necessity of commencing and carrying on their processes within this, the proper jurisdiction.

That we could not with any reason be so charged in this particular case is clear enough, when we consider that by the positive written law of the State of New York, in one of whose local courts this judgment was rendered, it is expressly prescribed, as I have formerly noticed, "that an action against a public officer, or a person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer, can only be tried where the cause of action arose, unless the court shall otherwise order.' So that any party there, who should complain of an act by a sheriff in one county of that same state, could not as of right call upon him to answer for it in another county, though the same laws must govern in both counties, and though there would be the same appellate jurisdiction to control their several courts.

I am confirmed also in the conviction that there would be no breach of the comity of nations in refusing to pay attention to such a judgment rendered in such a case, when, so far as I have read or heard, or can remember, there has been no instance in the course of sixty years that we have had courts exercising jurisdiction on the borders, and in sight of the state of New York, in which a similar use has been made of their authority with reference to any public officer of that state.

I do not wonder at the absence of authority in English reports applicable to such a case, for it is not probable, I think, that such a proceeding has yet taken place. If an instance could be shewn us, in which a sheriff of an English

county making a visit to Paris or Vienna, has had an action brought against him and damages awarded in a court there, for executing illegally in England, or for omitting to execute, the Queen's writ, and that the court in England which issued the process had used its authority for enforcing that judgment, then my difficulty would be removed.

I do not feel it necessary to refer again to any authorities which were cited by me in giving judgment in the court below, bearing upon this view of the present case; and I should probably not have returned to it again, if it had not been that this court put the counsel to the trouble of a second argument, very much with a view of assisting them to come to a satisfactory conclusion upon this point. And indeed it does involve a question of very considerable consequence.

Still we must remember that the declaration in this action discloses nothing more than that the plaintiffs had recovered certain damages against these defendants, Kingsmill and Davis, in an action brought in the Court of Common Pleas in the county of Erie, in the state of New York, "for a trespass," which, for all that appears, might have been committed there, and might have been of such a kind as to bring it most clearly within the jurisdiction of that court, and possibly within its exclusive jurisdiction.

In giving our judgment, as we must upon the record, we should know nothing of the facts if they had not been stated in the plea; and if I am right in assuming that none of the exceptions which are specially assigned as causes of demurrer to the plea are fatal, then we have to consider whether it is in substance a sufficient plea, or whether the court can properly say that, notwithstanding anything that appears in it, the plaintiffs should have judgment. They ought not to have judgment if the plea contains any one defence sufficient in substance, although that defence may be informally pleaded, or although the same plea may contain other matter which may be no defence, or may contain several defences, so as to make it double, or although it may be uncertain on which defence the defendant may have intended to rely, so long as his plea does contain some one defence sufficient to bar the plaintiff's recovery.

It is not clear, perhaps, whether by this plea the defendant meant merely to put himself upon his trial in this court, in regard to the merits of the action, and that his object was to make such a statement as would shew that he had done nothing wrong: or to shew that the judgment was rendered by a court which had no jurisdiction: or to shew that the foreign court so abused its authority by unjustly and illegally disregarding his defence, that their judgment ought for that reason to have no attention paid to it. Though we may not see clearly whether he meant to rely upon more than one of these points, or upon which one of them he meant to rely as his defence, yet I take it if we do see in this plea good matter of defence, sufficiently pleaded in substance, though not in form, we must give effect to it.

Looking at this plea with these considerations, it seemed to me, when it was in judgment before us in the court below, to contain a good legal defence upon grounds, some of which were stated by me in giving my opinion upon the 4th plea of the defendant Davis, and on the 4th plea of this defendant Kingsmill, which brought in question the same points to some extent as Kingsmill's 8th plea, now under our consideration, which I did not therefore repeat in speaking of the 8th plea, which last mentioned plea, I thought might also be supported on grounds applying only to that plea. I retain the opinion which I then expressed, that Kingsmill's 8th plea is in substance a good bar; though with by no means the same conviction of its sufficiency, since so many of my learned brothers here take a different view of it.

I need not state again any of the grounds of my judgment, which I have already assigned. As to any new light thrown upon the case by the discussions here, and by conference among ourselves, I think it right, in consequence of the diversity of opinion, to notice one or two points, which were not much dwelt upon in the court below, but have been a good deal discussed since. If the sheriff shews in his plea, that having legal process commanding him to seize the goods of Tanner, he did seize certain goods which at the time were Tanner's, and legally subject to be seized under the writ, and that it is for this seizure of the goods that damages have been

given against him as for a trespass, then he shews at least that he did in fact commit no trespass, but was justified in what he did; in which case all that would remain to be considered would be, whether that alone would be an answer to this action on the foreign judgment, or whether he must not shew something more, and whether he does or does not shew enough besides to entitle him to rely on that defence upon the merits, notwithstanding the foreign adjudication against him.

Then upon the first point, whether upon the whole plea we must say that the defendant positively avers the goods to have been the property of Tanner at the time of the alleged In one part of this plea he says that, upon the writ which had been delivered to him, he did in the discharge of his duty seize, take, and keep divers quantities of timber, then being the timber of the said Tanner. Then in another part of the plea, after stating the claim made to the timber by these plaintiffs at the time of the seizure, he adds:-"Whereas he, the said defendant, avers that, at the time of the same attaching and seizing, the said timber was, by the laws of that part of this province which formerly constituted Upper Canada, the property of the said Tanner, and subject to such attachment." It is in these two parts of the plea directly and positively asserted that the timber seized under the attachment against Tanner, and for the seizing of which judgment has been obtained against him, as for a trespass to the goods of these plaintiffs, was at the time of such seizure the timber of Tanner. Still, no doubt, unless the plea contains in itself some other good bar to the action, by reason of something which is not dependent on the truth or untruth of this assertion as to the property being in Tanner,—then, if we find in the same place an assertion or admission by the defendant that the timber was not Tanner's at the time of the seizure, that would make the plea bad for repugnancy, because the one statement would repel the other, and we could not tell which of the two inconsistent averments we were to adopt. But we could certainly not hold the plea to be bad on that ground, unless we could say that it did contain two assertions upon the point of property, which were plainly

opposed to each other; that is, were irreconcilable. So far from distorting the meaning of either averment, in order to make it appear inconsistent with the other, we are bound rather to reconcile them by understanding them in that sense, if they will bear it fairly and without any forced construction, which will avoid contradiction in terms. And this is reasonable, because when the defendant has twice asserted in his plea, in language that can admit of no two meanings, that the timber when he seized it did belong to Tanner, it is against reason to suppose that he could have meant by anything said in another part of the same plea, to declare or admit that at that very same moment the timber did not belong to Tanner.

Now, in this plea, if we put aside for the moment the argument that has been drawn from the doctrine of giving express color in pleading, which I shall presently advert to, there is no such repugnancy as would entitle us to hold that the plea contains absolutely inconsistent averments-for nothing can be more credible, or more easy to understand, than that one man may at a given time be the real owner of a chattel, although another man at the same moment may be pretending to own it, by virtue of an assignment. It is only what is happening constantly, and it would be absurd therefore to hold it to be impossible. Now what is there in opposition to the defendant's assertion twice made in direct terms, that the timber when he seized it was Tanner's (to say nothing of an allegation near the end of the plea to the same effect, though that is not an assertion of the fact, nor meant to be, but an assertion that he had proved the fact to the court)? Here is this statement only :-- "And the defendant further says that the said plaintiffs, at the time of the said attaching, claimed and pretended to own the said timber, by virtue of a sale thereof made to the plaintiffs by the said Tanner after the issuing of the aforesaid warrant, and the delivery thereof to the said defendant Kingsmill, while the same was in full force, and while the said timber was in the said district of Niagara; whereas the said defendant avers that, at the time of the said attaching and seizing the said timber was by the laws of Upper Canada the property of the said Tanner, and subject to such attachment."

It is quite consistent with what the defendant here says of the plaintiffs' claim under an assignment, that it may have been a mere pretence, without any foundation in fact; and we should rather so take it, I think, than to take it as being possibly meant in another sense, which would place it in direct opposition with the defendants' express assertion preceding and following it in the same plea, that the timber when seized belonged to Tanner.

It is laid down by Lord Chief Justice Tindal that, if a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of it idle and insensible, the court is bound to adopt the former construction (when the plea is not demurred to for the ambiguity.) (a)

But then the plaintiffs' counsel contends that upon the principle applicable to all pleas giving express color, we must assume the defendant to be admitting in this plea that an assignment of the timber had in fact been made to him by Tanner, which was only not effectual by reason of some legal objection to the assignment, which was entitled to prevail. No doubt that is so, in respect to pleas giving express color, for otherwise the very object of them would fail, because there would be not even that apparent right to the possession, which it is the very object of the plea to confess; and the plea, instead of being a good plea of confession and avoidance, would be objectionable in point of form as an argumentative traverse of what the plaintiff should have denied in direct terms, concluding to the country. But I cannot see that we should be warranted in importing into this case the doctrine applicable to pleas giving express color, in order that, by applying that doctrine to the present plea, we should give to the allegation of a pretended claim under a deed, all the force of a positive admission of a deed, when otherwise the same language would not necessarily import such an admission.

The defendant pleads this plea in answer to a declaration in assumpsit, in which pleas giving express color are never used. He is not charged in this action with a trespass—he is charged as having promised to pay a certain sum of money

⁽a) See 1 C. B. 787, 2 C. B. 650, 4 C. B. 393, 5 C. B. 568. e—VOL. XIII. Q. B.

recovered against him by a judgment. There is no allegation in the declaration that any goods were the goods of the plaintiff, and nothing therefore of that kind which the defendant was under any necessity, by the rules of pleading, of denying, or of confessing and avoiding. Neither is there any such allegation in this plea of plaintiffs being in possession of the goods, and of the defendant taking them from them, which is indispensable to a plea giving color. This is no plea giving color, and cannot be taken to have been pleaded with that view, for if it had been, it would have been not only unnecessary for such purpose, but also bad. Unless we look at the plea without reference to the nature of the action, or to the statements which the declaration contains as well as the plea, we cannot, I think, deal with this plea as if pleaded for the purpose of giving express color. The defendant answering no charge of having committed a trespass to the plaintiffs' goods, for the declaration says nothing about any goods of the plaintiffs. He is pleading in bar of an action of assumpsit, and is endeavoring to shew that, under the circumstances of the case there is no implied assumpsit. If his plea was on that account only an informal general issue, that would be no ground of objection, except on special demurrer; but that this plea does not amount to the general issue, and that the defence set up in it was proper to be pleaded specially since the new rules, is plain, I think, from the case of Haysoldon v. Staff (5 Ad. & Ell. 153.)

After frequent perusal of this plea, I am not sure that there is anything stated in it which was not meant to be subsidiary to the one single defence, that because the action was tried in the State of New York, and because the plaintiffs were foreigners—that is, not British subjects—the court would not allow it to be any defence to this defendant, that his act was justified and required by his duty as sheriff, according to the laws of this province, where the act was committed—for that the plaintiffs, not being domiciled in Upper Canada, could not be affected by the laws of Upper Canada. To bring this defence to a point, the defendant begins by stating that the judgment that is now sued upon, was recovered against him for an alleged trespass in taking certain timber alleged to have belonged to the plaintiffs; that he was sheriff of Niagara in Upper Canada, and as such did seize, by virtue

of an attachment, the timber in question, which belonged to one Tanner, whose goods he was commanded to attach; that the plaintiffs then came and pretended the timber was theirs by virtue of an assignment made by Tanner after the writ was delivered to him, the sheriff; but that the timber when he seized it was not the plaintiff's timber, but belonged to Tanner, and that his seizing it was therefore a plain act of public duty under the writ, and was no trespass. goes on to say that ever since this act was done by him in Upper Canada he has been living in the district of Niagara, of which he is a sheriff, as he was before; that he was never resident in the State of New York-by which he means that the plaintiffs had no pretence for seeking a remedy against him there, rather than in this province, where the act complained of was committed; that nevertheless, the plaintiffs brought an action against him in the foreign court, for a matter in which he had done only what was lawful according to the law of this province, to which law alone he was subject in respect to that matter—that is, by which alone his right could be affected, and according to which his conduct must be judged; that he offered to prove and did prove to the foreign court, that what he had done in this province was according to the laws of this province lawful, for that he had only seized under a writ against an absconding debtor, timber which at the time of the seizure belonged to him; but that the foreign court refused to give him the benefit of any such defence, because the plaintiffs were not British subjects, and declared that it was nothing to them what, our laws were, nor what he could legally do as sheriff in this province. He says that this was contrary to natural law and justice, and so indeed it would be. The plaintiffs deny nothing that the defendant has pleaded, but say that it amounts to no defence. I cannot bring myself to concur in that view. It may be (though the language of the plea, I think, does not warrant us in so holding) that the defendant means by this plea to admit that Tanner had made an assignment of the timber to the plaintiffs before the defendant made the seizure; and that what the defendant is contending for is that by our law that was ineffectual, because the goods were bound, as in the case of a

fi. fa., from the time of the writ being delivered to him. I do not feel authorized to say that that is necessarily intended, because even if the plea should be taken to mean, not merely that the plaintiffs pretended to own the goods under an assignment, which was in itself imaginary, or of which the defendant knew nothing one way or the other, but that they pretended to claim under an assignment which he, the defendant, admits had been made to them by Tanner after the writ came to the sheriff's hands; yet still such an assignment being admitted to be made after the writ was delivered to the sheriff, is not the same thing as admitting it to be made before the seizure. It might, for anything that is expressly stated in the plea, have been made after the one event as well as after the other; and if it were quite clear that it would be valid if made at any time before the seizure, we surely should not import into the plea a statement that it was made before the seizure, when the defendant has said no such thing, and when (if that would be the effect of its being made between the delivery of the writ and the seizure) the consequence would be to falsify what the defendant has said more than once in his plea in express terms-namely, that the timber when seized did belong to Tanner. I do not therefore see that it is of consequence to determine whether the attachment did or did not bind the timber before the delivery, because I do not think it stands admitted by the plea that it was assigned to the plaintiffs before the seizure, or assigned to them at all—though it is in this sense material, that if it were clear that the timber was bound from the delivery of the writ, then the plea would be unquestionably a good defence, under any construction we could possible give to it. I am not satisfied that the absconding debtor has a disposing power over his goods until they are actually seized under the attachment. My impression is otherwise, upon reason and principle, and on every authority I can find, so far as it is applicable. This is not like a distringas issued in England to compel appearance - the seizure which it authorizes is with a view to execution. Our first statute which laid the foundation of the proceeding (2 Wm. IV. ch. 5) recites that it was necessary to afford the means of attaching the property of absconding debtors, "that the same may be taken in execution, and sold for the benefit of their creditors." And it would be very inconsistent with the attainment of this object, if a debtor who has absconded or is lying concealed, could, notwithstanding the issuing of an attachment against his property, make valid dispositions of any portions of it, which he might have concealed as well as his person, until the sheriff can succeed in finding it and seizing it. The ninth clause of the statute contains nothing inconsistent, I think, with the idea that the attachment may bind before seizure, for it does not imply that in case of such a transfer as that clause is designed to prevent, the legal property shall pass by the transfer; but it subjects the person delivering up or passing away the absconding debtor's property after notice, to answer for its value, on the ground that he has committed a fraud. The goods may, by this misconduct of his, be placed out of the reach of any seizure, in which case recourse can be taken against the party who has, after notice, delivered them up to the debtor or assigned them. And indeed this clause making the third party liable in such case for the value of the goods after he has had notice of the attachment, whether they have been seized under the attachment or not, affords an argument in favor of the goods being bound without seizure. I do not find that the point has been determined in our courts. It did not arise in the case referred to of Gamble and Birchall v. Jarvis. I have looked at my note of that case; it contains the observation, "that after seizure the debtor would lose the disposing power over the goods "(as of course he would), but does not apply to the question of a sale after the writ issued and before seizure. When examined by analogy with writs of sequestration and of commissions of bankruptcy, there would seem strong reason to hold that an attachment against the goods of an absconding debtor should bind from the time of its being awarded or issued, or from the teste perhaps, except where the relation would work injustice, in which case the actual issuing of the writ, in the case of goods, would be the time referred to, and not the teste. The Statute of Frauds, 27 Car. II. ch. 3, sec. 3, cannot affect the question. It was restrictive only, and

was made to prevent the relation being carried further back than to the delivery of the written the sheriff. If it extended to writs of attachment, which it does not, it would make them bind from the time of delivery to the sheriff, and would make the assignment in this case invalid, though made before seizure, if made after the writ came to the sheriff; but that statute has nothing to do with such writs, which are left to have their force according to the principles of the common law. The reasons given for the course of the common law in always holding goods bound by the Fi. Fa. from the teste or award of the writ, would seem to apply very forcibly to the case of attachments against absconding debtors under our statute—the declared object of such writs being to secure the goods, that they may be taken in execution. What is said by Chief Baron Gilbert in his treatise on executions, page 13 et seq., by way of accounting for goods being bound from the issuing of the Fi. Fa., applied as strongly in this other case, and in some respects more strongly, for we must assume that the writ issued properly on facts to warrant it; in which case it would seem absurd that an absconding or concealed debtor should be able to defeat the command of the writ by exercising a power of disposal over his goods, which he has abandoned or concealed. This seems, however, to be a question which might be pursued to much greater length with little profit. In reason and on principle, I think that an absconding debtor should not be held to have a disposing power over his property after an attachment has issued, even though it might be clear that in the case of a foreign attachment in London, goods would not be bound before seizure, for the cases are dissimilar. on authority I am not able to say that the contrary opinion is wrong, and should not differ from my brothers on that point, if the case were necessarily to turn upon it.

But, as I have already stated, I think the defendant, independently of any opinion we may have formed on this point, is entitled to our judgment on the demurrer to his 8th plea, because that plea disclosed what, on general demurrer, is a good defence, although it may be exceptionable on the ground of duplicity or multifariousness, or as being argumentative.

It avers that the defendant was sheriff, acting for and within a bailiwick in this province, when he did the act complained of, under the authority, or at least by color of the process of the court; that he is still sheriff, residing within the same district and never has withdrawn himself from the proper jurisdiction for determining whether his act was legal. It avers directly and positively that he did that, and only that, which the writ directed him to do-namely, attach the goods of Tanner; and I see in the plea no assertion or admission inconsistent with this account of his proceedings. The plea avers further, that the defendant never was subject to the laws of the United States for or on account of the alleged causes of action, and never did reside or was domiciled within the jurisdiction of the Common Pleas of the County of Erie, in the State of New York-that being nevertheless sued, as he was, in that court, he proved the above facts, but the court determined (and, as the defendant says in his plea, contrary to natural right and justice) that he could not defend or justify himself by those facts, or by his position or duties as sheriff, under the said attachment, and that the claim of the plaintiffs to the timber in question was not, and could not be, affected by such attachment, or by the facts stated in this plea, the plaintiffs not being British subjects nor domiciled in Canada, and not affected by the laws of Canada, although (as the plaintiffs repeat) it was proved at the trial that Tanner and his property were subject to the attachment, and that the said timber was within the defendant's bailiwick, and was levied upon according to the laws of Canada.

There may, for all we know, be no truth in this account of the defendant of what was shewn by himself, or of what was adjudged by the foreign court; but in determining whether it would amount to a defence, we must, for the time, assume it to be true, as it is not denied, and nothing but the sufficiency of the plea is questioned. The plea may seem to resolve itself rather into a denial of the jurisdiction, than into a plea resting upon the denial of the act of the defendant being illegal, for I do not imagine that the jurisdiction of the County Court of the State of New York, over such a cause of

action can depend on the question whether they determined the case rightly or not upon the merits. I do not suppose we can try the trespass in this action of assumpsit; and it is on that view of the case that I consider we have no ground for looking upon the plea as a plea intended to give color as in an action of trespass. But it was necessary for the defendant to set forth such facts as would shew that it was an act of his official duty for which he was called in question, for without that, he would stand only on the same footing as any individual committing a trespass in the State of New York; and having so far to enter into his case, he would naturally not stop short in his statement and forbear to shew that he had acted legally under the writ which he was bound to execute. It does not follow, because he didthis, that he intended to rest his defence in this action of assumpsit on the question of trespass or no trespass, or that his plea would be bad, as tending to raise an immaterial issue. If we must look upon him as having endeavoured bona fide to defend himself, in his public duty, and by calling in aid the laws of this province, according to which alone, it is clear, he could be made responsible, and having made the endeayour in vain, because they would not listen to that defence, that in my opinion is a good bar to this action, which calls upon us to enforce this foreign judgment against our own officer.

And further, I repeat that where the defendant pleads that he never was domiciled within the jurisdiction of the County Court of Erie, and never was subject to the laws of the United States, he asserts that which, with reference to its trial in our court, we must treat as a matter of fact, and not matter of law. He undertakes to prove as a fact, that the County Court of Erie has not authority to try an alleged trespass committed by a public officer of another country out of the limits of the States; primâ facie, on the principles which, by commonlaw, limit the jurisdiction of inferior local courts among ourselves, the county court of the foreign State would not have jurisdiction over such a case; and therefore we cannot take it to be incredible that the defendant may be able to prove what he avers, that it has, in fact, no such jurisdiction. He may be able to shew us a written law, defining the

jurisdiction of the court, which will prove his assertion to be true, or he may call witnesses who will prove that this county court had not by law, either written or unwritten, any such authority.

If it had not, then the proceeding has been coram non judice, and it is of no consequence that the defendant being attacked there made the best defence that he could, in order perhaps to save himself or his property within that country from consequences, against which the tribunals of his own country could afford him no redress. Nor would it, I think, be any good exception to this plea, and especially on general demurrer, that the defendant does not tell us in his plea, on what ground it is that he asserts the county court not to have jurisdiction; in other words, that he does not inform us how he comes to know the fact which he asserts, for that is mere matter of evidence. And I must say that I have not yet prevailed on myself to believe that anything which the plaintiffs could even have replied in answer to this denial of jurisdiction could have been a good answer to the plea, because it does not depend on a foreign legislature to deprive our subjects of the protection of their own laws, either by authorizing their courts to refuse to act upon them, or by applying them as they please. All they can do is to exercise their authority within their own jurisdiction; they cannot call upon us, as of right, to aid them by enforcing in this country upon one of our subjects their view of the law or facts in a case like the present.

On the former argument, reference was made to a singular case which occurred in this Province not long ago. The owner of a slave, who had fled from Louisiana, one of the United States of America, traced him to this Province, and having followed him, endeavoured to prevail upon him to return. The man, who had escaped from slavery, acting on the advice of some acquaintance here, caused his late master to be arrested, as for a large debt due to him for several years' work and labour performed in the United States, claiming wages for the period that he had been working as a slave. The case was tried here, but the plaintiff failed to recover. If, however, he had recovered against his late

master, from the refusal of our court to pay any attention to the laws of the State in which the alleged cause of action had arisen, and if the plaintiff had procured an action to be brought in the State of Louisiana against the defendant on that judgment, I think I may venture to say that the plaintiff would find he derived little advantage from the adjudication of our court in his favour. And I must say, that in my opinion this case stands on much more favorable ground for the defendant, because it is attended with considerations of great public importance, which do not apply in the other case; and moreover, in this case the defendant has not withdrawn himself from the proper jurisdiction, but has always continued in the country to whose laws and courts he is properly responsible. If the plaintiffs should fail in this plea, they have only to commence their action against the sheriff here, for the alleged trespasses, as they ought to have done at first, there being no pretence for their having done otherwise.

This is my own present view of this case; but the opinion of most of my learned brothers is against the sufficiency of the eighth plea and in accordance with the judgment given in the court below, which is therefore affirmed, and the appeal will be dismissed with costs.

THE CHANCELLOR.—The only questions argued upon this appeal were raised under the general demurrer to the 8th plea.

The declaration is in assumpsit, upon a judgment recovered in the Court of Common Pleas for the County of Erie, in the State of New York; and the only allusion in the declaration to the cause of action upon which that recovery was had is, that it was for certain trespasses committed by the defendant against the plaintiff.

The defendant is the sheriff of the Niagara District; and the trespasses complained of consisted in the seizure by him, as sheriff, within his county, and under a writ duly issued, of certain timber, said to have been the property of the plaintiff.

It is clear, I apprehend, that the foreign court, in determining the question of trespass in that action, should have

been guided by the law of this country. It follows consequently, that a plea alleging that the property in question, according to the law of this country, was liable to seizure by the defendant, under the writ upon which he proceeded; that all his proceedings in relation to such seizure were in accordance with the law of Canada, but that the foreign court has refused to give effect to those facts, although proved, upon the ground that the defendant's position and duty, as sheriff, according to the laws of Canada, did not constitute a justification as against the plaintiffs, who, not being British subjects, nor domiciled in Canada, were not affected by the law of Canada—it follows, I say, and it is not I believe denied, that such a plea would present in substance a valid defence.

Now it appears to me that the eighth plea does in fact present that defence. It states that the trespass upon which the judgment was founded consisted in taking and carrying away certain timber, alleged to have belonged to the plaintiff; that at the time of such taking the defendant was sheriff of the District of Niagara, and that Davis having previously duly sued out a writ of attachment against one Tanner, as an absconding debtor, had placed the same in the defendant's hands, as such sheriff, for execution; that while the said writ was in full force the defendant, as such sheriff, duly seized the timber in question, then being the timber of Tanner, in virtue thereof; "that at the time of such attaching and seizing, the said timber was, by the laws of Canada, the property of the said Tanner, and subject to the said attachment;" that the alleged trespass consisted in the seizure in question; that at the time of such seizure the defendant was, and since continually has been, resident and domiciled in Canada, and not within the jurisdiction of the foreign court, or subject to the foreign law; "that by and according to the law of Canada, where the said cause of action and every part thereof arose for which the judgment was recovered, the said taking and carrying away didnot, and does not, give the plaintiff any cause of action against the defendant, nor was heliable to be prosecuted therefor;" that the Court of Common Pleas wrongfully, corruptly, and contrary to natural right and justice, although these facts were proved as a defence for the

defendant, refused to admit such facts, or any of them, as a defence for the defendant, and declared and adjudged that the defendant could not defend or justify himself thereby, or by his position or duty as sheriff under the attachment, and that the claim of the plaintiffs could not be affected by such attachment, or by the facts stated in the plea, the plaintiffs not being British subjects nor domiciled in Canada, and not affected by the laws of Canada; although it was proved at the trial, that Tanner and his property were subject to the said attachment, and that the timber was within the sheriff's bailiwick, and was levied on therein according to the laws of Canada.

It is not denied, I apprehend, that this plea, if confined to the allegations I have stated, would have been sufficient in substance, and must have been upheld upon this general demurrer. Such I understand to be the opinion of a great majority of my learned brothers. But it is said that the plea contains a further statement not yet noticed, which is, in effect, an admission by the defendant of the plaintiff's property in the timber, upon which he is entitled to succeed; and it is this allegation, I believe, which has given rise to the principal difficulty in the construction of the plea. The passage alluded to, follows the statement of the seizure of the timber, "then being the property of Tanner," and is in these words, "and the defendant further says that the said plaintiffs, at the time of the said attachment, claimed and pretended to own the said timber, by virtue of a sale thereof made to them, the plaintiffs, by the said Tanner, after the issue of the aforesaid warrant of attachment, and the delivery thereof to the defendant, and while the same was in force, and while the said timber was in the said District of Niagara." Then follows the allegation before stated, "whereas the said defendant avers that at the time of the said attaching and seizing, the said timber was, by the laws of Canada, the property of the said Henry Tanner, and subject to such attachment.

It is said that the passage just above cited contains a conclusive admission of sale by Tanner, to the plaintiff—that is, of property in the plaintiff—that is, of the right to recover in this action; and numerous well known decisions upon the effect of such allegations in pleas giving express color in actions of trespass, are referred to us as in point.

Upon all questions, but especially upon one of this character, arising in a court of law, I differ from my learned brothers, whose daily considerations of such matters renders them so much more competent to form a correct opinion upon such subjects, with the utmost diffidence. But the parties have a right to my judgment, such as it is; and the best opinion I have been able to form is, that the allegation in question has not the effect of invalidating this plea.

It does not appear to me that pleas giving express color in actions of trespass are at all analogous to the present case. A certain class of pleas, by way of confession and avoidance, would, in strict reason, have been bad, as negativing altogether the plaintiff's allegations of title, and therefore only pleadable, in strictness, by way of traverse. Pleas objectionable on this ground however, were, under some circumstances, found to be convenient; and this gave rise to a fiction known as express color, invented for the purpose of giving validity in point of form to a class of pleas, which, irrespective of such fiction, would have been pronounced bad, as repugnant to the very principle upon which pleas in confession and avoidance are constructed. It consists in an unconnected statement, introduced into the plea for the sole purpose of admitting a colorable title in the plaintiff. It is not traversable, because, being mere fiction, to permit the plaintiff to traverse it would be in effect to abrogate the rule; but it is a statement absolutely necessary to the validity of the plea; and where, instead of stating a colorable, it admits a perfect title in the plaintiff, it is of necessity fatal to the plea.

It is perfectly obvious, I think, that decisions in relation to such pleas can afford no safe analogy for our guidance in the present case. The admission of title in such cases is an isolated statement, unaffected in construction by the residue of the plea, because wholly unconnected in meaning, and which, construed alone, can afford no room for the argument that the plea is best to be construed as admitting such title in the plaintiffs as alleged, because the statement is intro-

duced with no other object than to make such admission. Without some such admission the plea would be bad. From the very form of such pleas therefore, this must be construed as admitting in the plaintiffs such title as alleged. The validity of that title therefore is the only question, and in that respect the statement is neither restricted nor enlarged by the other allegations in the plea.

But express color was not necessary to the validity of the plea in this case. It admits the judgment upon which the plaintiffs count, and avoids it by alleging that a good defence had been proved according to the law of Canada, by which only the question could have been legally determined; but that the foreign tribunal had refused to give effect to that defence, upon the ground that the plaintiffs were not subject to the law of Canada, and could not be affected thereby. Had this been an action of trespass, and had the defendant, for the purpose of giving color and to render his plea correct in form, stated that the plaintiff claimed the goods under a sale from the owner—that is, had he admitted a perfect and not a colorable title—such statement, I presume would have been fatal to the plea. That express color would have been quite unnecessary in the plea; and this allegation in question cannot be reasonably intended, I think, to have been introduced for any such purpose.

In order, therefore, to determine whether the allegation referred to, is to be construed as admitting a sale to have taken place, or as stating that the plaintiff claimed, and pretended it to have taken place, whether it is to be construed as the admission of a fact, or as the statement of a pretence, we must look at the whole plea. Now, not only is this allegation preceded by the statement that the defendant seized the timber, "then being the timber of Tanner," but it is also followed by an averment of property in him, in a form which seems to me to remove all doubt. The whole passage runs thus, "and the defendant further says that the said plaintiffs, at the time of the said attaching, claimed, and pretended to own, the said timber, by virtue of a sale thereof made to them, the said plaintiffs, by the said Tanner* * * * whereas the said defendant avers that at the time of the said attaching and

seizing, the said timber was, by the laws of Canada, the property of Henry Tanner, and subject to such attachment."

Now the expression "whereas the defendant avers," imports undoubtedly that something is to follow contrary to the preceding allegation—that the pleader certainly did not mean to deny that the plaintiffs claimed and pretended to own under a sale from Tanner. The action and recovery had placed that beyond doubt. What is it then that he did mean to negative? Obviously the fact of sale, at least of an effectual sale. It must be borne in mind that this question comes before us on general demurrer.

Again: the plea avers that, according to the laws of Canada, "the said taking and carrying away did not nor does give to the plaintiffs any cause or right of action against him, and he was not by the said laws liable to be prosecuted therefor." And the plea concludes with an allegation that it had been proved at the trial that "the timber had been levied on according to the laws of Canada."

Then if the passage in question will admit of either construction, and if the allegation to which I have referred shews conclusively that the defendant cannot have intended to admit a sale, it will be our duty, I apprehend, to uphold this plea.

It is said, however, that the plea does not allege that the plaintiffs pretended to own under a sale from Tanner, generally, but under a sale from Tanner "after the issuing of the aforesaid warrant of attachment and the delivery thereof to the defendant, and while the same was in force, and while the said timber was in the said district of Niagara," and it is contended that the subsequent allegation of property in Tanner must be understood, not as asserting a general right of property in him, but only property as against a sale under the special circumstances stated in the plea. This constitutes, as it seems to me, the only real difficulty in the construction of this plea. Such may have been, no doubt, the primary intention of the pleader. But I find in the plea, a general unqualified averment that the property at the time of the seizure was the property of Tanner, and that such seizure was legal according to the law of Canada. And it is averred that those facts had been proved, and that the foreign tribunal had refused to give them effect, not for any defect in proof, but on account of the inapplicability of the law of this country, by which the liability of the defendant ought to have been determined. Now, in my humble opinion, the statement referred to cannot control these general unqualified allegations; they must prevail against a mere inference, which would have the effect of invalidating this plea upon general demurrer.

MACAULAY, C. J. C. P.—Although most of the cases in the books are of actions upon foreign judgments recovered for debts or pecuniary demands, I find no reason to doubt action, of debt or assumpsit being maintainable upon foreign judgments (like the present) founded upon torts to personal property; though committed in another country, and not therefore against the peace, &c .- Smith v. Nicolls (5 Bing. N. C. 208), Henderson v. Henderson (6 Q. B. 298). The grounds of the foreign judgment need not be stated in declaring thereon, nor is it necessary to state that the cause of action arose within the jurisdiction of the court, nor are they stated in the present case.-1 Wil. 319-20, 1 Saund. 74, 1 A. & E. 608, 8 Q. B. 1031, 4 C. B. 287, 12 Jur. 851, 8 Jur. 404, though it is otherwise when pleaded as a defence.— 2 East 260. The justice thereof is to be presumed until the contrary is clearly shewn.-1 M. & G. 882, 2 Scott N. R. 138, Cowan v. Braidwood (6 Q. B. 298, 1 L. J. 96, 274, S. C). But it may be impeached on the ground that the proceedings were contrary to natural justice, or that the foreign court had no jurisdiction over the person of the defendant or the subject matter, or that it was contrary to the lex rei sitæ or res gestæ, or the laws of another country, which ought to have governed. -2 B. & Adol. 951, 757, 20 L. J. N. S. Q. B. 284, 11 M. & W. 877, 13 M. & W. 628, 5 Q. B. 94, 3 C. B. 187, 134, 11 A. & E. 179, 12 A. & E. 753, 4 Ex. 290, 11 Q. B. 1015, 1 Camp. 69, 9 East 192, 1 Stark. N. P. C. 525, 4 Bing. 686, 1 Q. B. 889.

At the argument of this appeal, the case was rested upon the eighth plea.

If I had been satisfied that the plea was good upon general

demurrer, I should be disposed to think the grounds of special demurrer insufficient—3 C. B. 179; but as I have not been able to come to that conclusion, it is unnecessary to notice the special causes assigned.

This plea is in confession and avoidance—4 A. & E. 489; 4 M. & S. 126. It confesses the judgment with its primâ facie consequences. The question is, whether it sufficiently avoids it, by shewing a general want of jurisdiction in the foreign court, or a want of jurisdiction over the person of the appellant, or over the subject matter; or that the judgment was rendered contrary to the law of Upper Canada, which ought to have governed, or contrary to natural justice.

I do not think it shews a want of jurisdiction over the person of the appellant by reason of his domicile or residence in Canada, for he may consistently with the allegations in the plea on this head, have been within, and been served with process within, the jurisdiction of the foreign court.—9 M. & W. 819, 11 M. & W. 894, 12 A. & E. 753, 15 M. & W. 434, 3 C. B. 187. And the plea does not allege that the appellant made no defence, or was refused to be heard, or that the judgment was rendered against him ex parte or behind his back. It admits that a defence was made for him if not by him, and the judgment is not otherwise shewn to be against natural justice.

The plea shews that the original cause of action arose in Upper Canada, and that the appellant committed the act complained of, under color of his office as sheriff, in the execution of a warrant of attachment, which is a civil incipient process against the effects of an absconding debtor. If it shews that he did the act virtute officii—that is, that it was legal according to our law—it is no doubt a good defence. But I am not prepared to say that it is sufficient for him, without regard to the legality of the act, to shew merely that he acted colore officii, however bonâ fide as to his own belief of its legality, if in law it was tortious and unjustifiable; or that the law of nations confines the remedy to our domestic courts; or that our courts ought not by comity to aid in enforcing the judgment recovered for such injury, because it was recovered in the court of a foreign country.—Plow. 64, 9

East, 364, 2 B. & C. 729. It is not alleged that the foreign court, although a County Court of Common Pleas, had no jurisdiction according to the laws of the country in which it was exercised, unless it is to be inferred.

If an action of trespass could be maintained in one of our courts, by a British subject residing in Upper Canada against the sheriff of one of the counties of the State of New York, for wrongfully seizing the plaintiff's goods within such sheriff's county, under a process against the goods of a third person (as I think it might), I do not see why, upon the same principle, the present action is not maintainable, because the appellant was a sheriff acting colore officii, though illegally, any more than if he were a mere private individual. -Story's Conflict of Laws, s. 408, &c.; Vattel B. 2, ch. 8; 7 Ray. 223, 1 H. B. 691, 3 T. R. 733, 1 East, 315. It was not an act of state or an act commanded by his government, or by the warrant under which he acted, unless the goods were Tanner's. The attachment gave no specific command to do the act complained of, nor any authority to do it if illegal. I can perceive no reasons of policy why our courts should refuse their aid to the foreign judgment creditor according to the usual comity in like cases .- Story's Conflict of Laws, secs. 530, 537, 539, &c. If sued here for the alleged trespass, the appellant would be obliged to justify the act and shew it legal by our laws. He is now sued here in respect thereof, indirectly, though not directly; and if his plea shews that the seizure was lawful, it is a valid defence.

I do not think it enough for him to say that whether legal or not, the court abroad had no jurisdiction over the appellant, because he acted officially, however erroneously, or that our courts ought to refuse their aid to enforce the judgment out of mere deference to the office of sheriff. I do not therefore think that the plea makes out a defence upon any ground affecting jurisdiction or comity, apart from the merits.

If then the judgment is prima facie good, the appellant must displace it by rebutting the respondent's right to recover by reason of something internal, and weaken plaintiff's doing so by impeaching their title to the timber, and shewing that it was Tanners, or at all events, by shewing that it was legally attached.

The plea does not state that the timber was Tanner's at any time before the seizure, nor when he made a sale thereof to the respondents, except impliedly by alleging that it was his at the time when, &c., and that the respondents claimed to own it by virtue of a sale made after the delivery of the attachment to be executed. When the attachment was tested or issued, or delivered, or whether it runs in the Queen's name, are facts not stated: the latter may be presumed. And if by the law of Upper Canada it bound Tanner's goods from its delivery or teste, which must have preceded its delivery, the subsequent sale to the respondents would not defeat it, and the seizure would be lawful. One important point therefore has been, whether warrants of attachment issued under the statute 2 Wm. IV. ch. 5 do so bind the property by relation; and the most satisfactory opinion I can form is, that they do not .- See 5 Wm. IV. ch. 5, 2 Vic. ch. 5, 3 Vic. ch. 7, 12 Vic. chaps. 47 & 69, 13 & 14 Vic. ch. 53, sec. 64.

The Statute of Frauds relates only to executions not incipient, or mesne process like this: The object of which is not to realize a judgment debt, but to secure an alleged demand by compelling bail or detaining the effects of absconding or concealed debtors. Many cases bear upon the subject; I will refer to those reported in 2 Burr. 967; 4 East, 523; 6 B. & C.650; 5 Tyr. 90; 1 C. M. & R. 507; 9 Bing. 128; 11 A. & E. 859; Com. Dig. Process, D. 7; Exn. D. 1, 2, and Relation; Vin. Ab. Forfeiture, Teste, Exn. A. (a), and Relation.

If attachments had any retrospective relation, it would be to the teste, and would bind all the estate real and personal; thereby acting more stringently than final process, and would tend to cause the very evil the Statute of Frauds was meant to obviate in executions—Gilb. Exn. 13, 14, 36, 37; 2 Vent. 200. It seems to me such warrants are more in the nature of distresses.—Gilb. Distress 19, 20; 1 Vent. 221; Bro. Attach't. pl. 20; Cro. Car. 150; W. Jo. 202; Cro. El. 13; and that they do not bind till executed, or laid on, as it is termed in some of the books—Story's Conflict of Laws, s. 374, &c., 383, &c., 395-6-7, 400, s. 549 and note; Plowden 491, a.

The remaining point is whether the plea confesses a title in the respondents without sufficiently avoiding it.—4 A. & E. 489, 4 M. & G. 126. The form of expression is, that "at the time of the attaching, &c., the respondents claimed and pretended to own the said timber, by virtue of a sale thereof made to them by Tanner after the issue of the attachment and its delivery to the appellant Kingsmill, and while it was in force." I think the words "to own" relate to the word "claimed," as well as to "pretended;" and it is to be observed that the averment is not that by color of a pretended sale the respondents claimed to own, but that they claimed to own by virtue of a sale; and the distinction is material, as pointed out by Maule, J., in the case of Wright v. Burrows (3 C. B. 685, and note); 4 D. & L. 438; 10 Jur. 968; 16 L. J. N. S. C. P. 6.

Whether the respondents could have taken issue upon this plea by replying de injuria absque residuo causa, admitting the attachment, or by a special traverse of the allegation that the timber was Tanner's at the time when, &c., prefaced by an inducement affirming the respondent's title in general terms, or stating it specially or in some other form of replication, and upon whom the onus probandi would rest, and what would be sufficient prima facie evidence of the right of property alleged to be in Tanner, in opposition to that primâ facie implied in and conceded to the respondents, or to that which is referred to in the plea if proved, do not form questions material to be at present considered. - 5 C. B. 703, 1 M. & W. 682, 3 M. & W. 622, 4 M. & G. 427. Nor does it appear, nor is it material to the present point in this demurrer, on what proof of title or ownership the respondents. recovered judgment in the foreign court, unless it is to be presumed (as I am disposed to think it ought to be), that it was upon the same title as that suggested in the plea.

The averment in the 8th plea has been likened to express color given in a plea to a declaration for trespass to the plaintiff's goods, setting up title in answer, &c. It has also been termed a mere narrative of what the respondents claimed to be their title at the time of the seizure, followed by a statement that the same was among other things proved in

the defence at the trial; and it was contended that it was not to be regarded as introduced in order to give color, or as any matter of supposal or substantive averment of fact on the appellant's part, as to what he alleged or supposed the respondent's title to have been, and which he was willing to admit, in reliance upon the attachment against Tanner's effects and his prior ownership as sufficient to defeat or avoid it; but to be looked upon only as mere relation or statement of what the respondents themselves asserted, as constituting the title under which they claimed to own the timber.—Stephen Pl. 243; 1 East, 213-5; 3 Sal. 273.

It may not form what is technically called express color, because the judgment on which the action is founded is admitted; but it appears to me equally necessary to prevent the plea being demurrable, for the plea seeks not only to confess and avoid the judgment, but to avoid it by confessing and avoiding the respondent's title to the timber, by reason of the attachment; and the analogy is, I think, obvious.

The main object of the plea is to shew that, at the time when, &c., the timber was Tanner's, or liable to be attached as his; whence it follows as a necessary consequence that, if so, it could not, at the same time, have been the respondents', as the judgment imports, and as the plea virtually admits it to have been, without denying it, except argumentatively. A further object is to shew that a better right of the attachment creditor as against the respondents, was proved at the trial abroad, without avail. If the respondents had no title at all by the laws of Upper Canada, and that was proved at the trial, the appellant might have so framed his plea, stating the color of title which had been held a good title by the foreign court; but he does not do that. He does not deny any title, or any such title as the plea says the respondents claimed to have, or as they proved; but the plea is no avoidance of their title; and to be good in form according to the rules of pleading, it ought expressly, or impliedly, or in the matter of it, to confess a colorable title at least in the respondents, and so defeat it by setting up a better title in some one else.—Steph. Plg. 230, 233, 245, 461-2; 6 U.C. Q. B. Rep. 86.

Objections of form to the plea on this ground are obviated by the statement of the title under which the respondents claimed to own, and which the appellant considers sufficiently avoided by the title alleged in Tanner, and the attachment, &c. I mention both, because I think they are to be taken together: for if not, and if the allegation that the timber was Tanner's is to be taken as of itself sufficient, irrespective of the attachment, there could have been no necessity for saying anything about an attachment, for in that event the appellant had only to plead that the alleged trespass was in Upper Canada, and the timber Tanner's, and that he had proved it according to our laws, without saying anything of the title, on which the respondents had nevertheless recovered judgment for such trespass, as being to their property.

Whether tried by analogy to express color, or by the test of what amounts to an averment of fact, or a sufficient confession, &c., I think the plea does, in the nature and frame of it, admit a primâ facie right of property in possession in the respondents generally, and does in the matter of it, admit or confess a special title in them, acquired by a sale from Tanner after the attachment was delivered. This special title it treats as only colorable, or at all events as avoided by the paramount binding force of the attachment.

Ist. That color, given in the terms of this averment in a special plea of trespass for seizing goods, would be sufficiently explicit, is clear; the common form of giving color being that the plaintiff claimed by color of a character of demise for life omitting livery, or an oral gift of goods omitting delivery, &c., whereas nothing passed thereby—4 Ex. Rep. 478; 6 A. & E. 899; 9 Bing. 128; 11 M. & W. 281; 14 M. & W. 107; 14 M. & W. 239. The whereas in this plea is not that nothing passed by the sale spoken of, for that could not be truly affirmed, inasmuch as something did pass—namely, the right of property as between Tanner and the respondents, subject only to the binding force, if any, with which the attachment affected such title.

In Com. Dig. Plg. 3 M. 40, it is laid down that color is a feigned title given by the defendant to the plaintiff in trespass, &c., when the defendant would refer his title to the

court without sending it to a jury; for without such color his plea would amount to the general issue.—10 Co. 90; Doc & Stu. b. 2, c. 53. The objection, if omitted here, would be, not that the plea amounted to the general issue, but that it did not amount to a confession of any right or title in the respondents, although it argumentatively traversed it, or rather sought to avoid it through the medium of the attachment.

It is of the essence of color that it should admit a colorable title only, referring it to the court, which title should prevail in law, the colorable one supposed, or that pleaded in destruction of it; and it is the very object of the present plea to refer it to the court which title is the best, that ascribed to the respondents, or that of the attaching creditor of Tanner's effects. If a plea giving color goes too far and admits a good title-i. e., suggests or supposes facts amounting to a good title—it is repugnant and suicidal. The case of Radford v. Harbyn (Cro. Ja. 122) is quite in point. Although color, being regarded as mere form and fiction, is not traversable, for obvious reasons, when the title conceded is not colorable, as explained in Chitty, jr., Forms, p. 574 (note), and in 2 M. & W. 96-7, note; still, for the purposes of the plea, the facts stated are always taken to be true; and although the plaintiff cannot deny the color in point of fact, he may adopt it as correctly stating his title, and rely upon it on demurrer, as shewing a valid title in law not evaded by the antagonist's title set up against it.

It is a rule of pleading (a) that all pleas in confession and avoidance should give color, express or implied. The matter sought to be avoided here, is the alleged ownership of the respondents, or the sale of the timber, which are to be prima facie assumed in their favor, as proved, by the consideration, that if the right or title set up adversely to theirs fails, or is displaced, their right and title remain unimpeached, and stand confessed. Wherefore, without denying that they had any title or denying the title specially mentioned in the plea, it avers that at the time when, &c., the respondents claimed

⁽a) Steph. Plg. 461, et seq.; 1 Chit. Plg. 499; 10 M. & W. 593.

to own the timber by virtue of a sale made to them, after the delivery of the attachment, followed by the whereas (not that there was no such sale, or that nothing passed by it, or the like—but whereas) the timber was, by the laws of Upper Canada, Tanner's property.

The appellant alleges or supposes the foundation of their right or claim, by saying that they claimed to own it (of course as against its liability to the attachment) by virtue of a sale made after the delivery of such attachment; and it appears to me that the nature of the respondents' title is averred in terms quite as express as Tanner's, &c., their title under such sale being treated in the plea as invalid and insufficient to confer the ownership claimed by them, as against the attachment. If however it was not in law liable to the attachment, at the time when, &c., then the plea in effect shews that the respondents owned it, and yet alleges that it was Tanner's timber.

2ndly. Treated as an averment or allegation, not introduced as mere color, the effect is the same. I do not think it can be read as a mere narrative of what the respondents claimed to be their title; it is not so expressed, but amounts to an allegation that at the time of the seizure the respondents claimed to own, and that this claim was the sale mentioned; and this construction is, I think, consistent with the intent and meaning of the plea. - 7 B. & C. 464; 5 C. B. 224. On demurrer, the plea is to be construed most strongly against the party pleading it-Stephen's Pleading, 415, 419; and if the plea is good with the averment, but would be bad without it, that proves it a sufficient averment, if any such fact was material to have been stated to render the plea good. If not necessary to have been stated, still, being stated in terms sufficiently explicit had it been necessary, the effect is the same. - Dougl. 666-8.

There are many cases respecting the sufficiency of the confession, in pleas of confession and avoidance, which the present virtually is, not only as respects the foreign judgment, but also the trespass, and the respondents' right to recover therefor in respect of their title as possessors of the property in question.—1 Chit. Plg. 315, 1 Saund. 117 (4),

2 Saund. 61 k. (9); 1 A. & E. 102, Gale v. Capern (4 Tyr. 863), Gould v. Lasbury (1 Cr. M. & R. 254); Eavestaff v. Russell (10 M. & W. 356): as to the word "supposed"—Scadding v. Eyles. 9 Q. B. 858; 10 Jurist, 945: as to "claimed and demanded"—4 A. & E. 489.

Now here the word "claimed" relates to the words "to own;" the respondents claimed to own. How, or by what title did they so claim to own? the plea says by virtue of a sale made to them by Tanner after the attachment was delivered; not as merely narrating what they said was their title, but stating what their title was. By transposing the words it would read thus, "by virtue of a sale, the respondents claimed to own." Now the allegation that a person claimed to own by virtue of a sale, and by virtue of a sale claimed to own, appear to me convertible terms, and of equivalent import; and the transposition shews clearly that it is here used as an averment of the fact of such sale, and not merely of what the respondents claimed or alleged to be the fact.

I look upon several allegations in this plea as mere inferences of law, not substantative allegations of fact; and of which it may be said, in the language of E. V. Williams arguendo in Hopkins v. The Mayor of Swansea (4 M. W. 636), that they carry the defence no farther than if not stated at all; such as, that at the time when, &c., the said timber was, by the law of Upper Canada, the property of Tanner, and subject to the attachment, and that it was proved at the trial (abroad) that Tanner's property was subject thereto, and the timber levied upon according to the laws of Canada; and that the foreign court wrongfully, corruptly, and contrary to natural justice, refused to admit the facts then proved, and now pleaded as a defence-1 M & G. 882, Maule, J., and Bosanquet, J. For after all, the substance of the pleaamounts only to this, that the appellant, being sheriff of the Niagara District, received a warrant of attachment against the effects of Tanner-that on the 20th June, 1846, he seized the timber thereunder, then being the timber of Tanner -and that the respondents at the same time claimed to own it by virtue of a sale thereof made by Tanner to them after

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the delivery of the attachment; which facts were proved at the trial (abroad), but that it was adjudged by the court that the claim of (i. e., claim to own, or the title proved by) the respondents could not be affected thereby, seemingly on the ground that the foreign court declined giving effect to our statute and the attachment issued under it against Tanner's goods, if the effect thereof was to bind the property against a sale afterwards made by him bond fide and for value to American citizens or foreign residents, and before the seizure,

On such a state of facts, I do not perceive a good defence displayed. If the same facts were pleaded to an action of trespass for seizing the timber in one of our courts, the respondents would be entitled to judgment on demurrer, or to a verdict, if proved, under a plea of not possessed; and if so, it proves that the defence offered at the trial abroad, which was an action of trespass for that very thing, was insufficient to bar the action according to our laws; and therefore that the judgment was rendered in conformity with, and not contrary to, the laws of Upper Canada.

The present action is virtually for the trespass to the respondents' goods, through the medium of the foreign judgment; and the object of the plea is to shew that at the time when, &c., the respondents had no possessory title to the goods according to our laws, which no doubt ought to govern, and that it was proved at the trial, but was rejected as a defence. The appellant does not attempt this by saying in direct terms that they did not own, or that there was no such sale of the timber, and that nothing passed by it; but indirectly, by alleging that it was Tanner's timber, without adding anything to reconcile the two inconsistent rights, so alleged, except the prior right and binding force of the attachment.

The best opinion I can form therefore, is-

1st. That the plea does not shew, and that we cannot intend, that the court abroad had no jurisdiction over the subject matter; or

2ndly. Over the person of the appellant, either because he was domiciled and resident in Canada, or a public officer, and having acted colore officii in the premises.

3rdly. That the attachment did not bind the property of

Tanner in the timber from the time of its delivery to the appellant to be executed.

4thly. That a sale by Tanner to the respondents before the timber was seized, or the attachment actually laid on, is admitted or alleged.

5thly. That such a sale is not impeached as fraudulent and void against the creditors of Tanner, or against the said attachment, although made hanging such warrant, nor defeated on any other ground.

6thly. And therefore, that the judgment declared upon is not shewn to be against the laws of Upper Canada, corruptly rendered, or against natural justice.

McLean, J .- The plaintiffs sue in assumpsit on a foreign judgment recovered against the defendants for an alleged trespass by them committed, in which judgment a specific amount for damages and costs are awarded to the plaintiffs. The judgment does not shew where that trespass was committed, and for aught that appears in the judgment as disclosed in the declaration, it may have been committed in the United States and within the jurisdiction of the Court of Common Pleas in the county of Erie, in which the judgment was rendered. In that case the trespass alleged must have been decided according to the law of the State of New York, and the judgment of the court would be conclusive between parties who had litigated the case there. But if the trespass was one committed to personal property of the plaintiffs, within this province, then the laws of this province, and not the laws of the State of New York, ought to decide whether the defendants had in fact been guilty of any trespass or not. If the seizure and taking of the timber, which the defendants in their pleas allege was made under particular circumstances in this province, was in fact not a trespass according to the laws of this province, then they ought not to be held liable in a foreign court, though according to the laws of the foreign country, the act complained of might amount to a trespass; and if they have been held liable under such circumstances in any action on the judgment against them, they must be at liberty to impeach the decision by shewing the facts and

establishing their innocence of the alleged trespass. If the decision of the foreign court has been arrived at in pursuance of the law of the foreign country, without regard to the law of this province, in which the alleged trespass was committed; or if it has been made upon a mistaken or wrong view of the law of this province, taking it as the rule of decision, the defendants must be entitled to object to and claim protection from a judgment so obtained. It would indeed be monstrous to hold, that if a public officer in this province, in the execution of his duty, were to commit an act perfectly justifiable according to the laws of the province, and on going into the adjoining State of New York he were held liable for that act, and a judgment rendered against him; yet that in an action upon that judgment, the courts in this province are bound to give effect to it, and to regard it as conclusive between the parties. A foreign judgment is primâ facie evidence only, and liable to be impeached, if the foreign law or any part of the proceedings of the foreign courts are repugnant to natural justice; or if, for a cause of action arising out of the jurisdiction of such court, the decision is made according to the law of the country in which the suit is tried, instead of, and contrary to, the law of that country in which the cause of action arose.

The defendants, with a view to impeach the validity of the judgment declared on this case, have severally pleaded a variety of pleas; and the 3rd, 4th, 5th, and 6th pleas of the defendant Davis, and the 3rd, 4th, 5th, 6th, 7th, and 8th pleas of the defendant Kingsmill, are demurred to.

The argument on both sides has been directed entirely to the 8th plea of the last named defendant, and it appears to be conceded that if that plea cannot be sustained, none of the others can. It becomes therefore only necessary to consider that plea.

The only grounds of demurrer stated are, that the pleadings in the action should have been set out: that it does not appear that the defendant had pleaded any such defence as he offered to prove, nor that he refused to submit himself to the jurisdiction of the court and to abide by its decision.

These grounds were held by the Chief Justice in the court

below not to be tenable, and the plea was declared in his judgment to be sufficient on special as well as on general demurrer. The judgment of Mr. Justice Draper in that court does not appear to me to be founded upon any of the objections stated, but on a ground of general demurrer appearing on the face of the plea-viz., that the plea admits a sale of the timber, the subject of the action, to the plaintiffs, by Tanner, the absconding debtor, against whose goods the attachment was directed, and previous to the seizure of it by the defendant, which seizure constituted the alleged trespass; and the judgment of Mr. Justice Burns as to this plea, proceeds chiefly upon the ground stated in one of the plaintiff's objections, that the pleadings in the original action ought to have been set out, in order that it might appear how and in what manner the defendant defended himself. Against the judgment rendered upon the demurrer, the defendant Kingsmill appeals to this court, and in my judgment his grounds of appeal are sustainable.

The plea was intended to shew a state of facts as having been established and proved in the foreign court, which the defendant contends, according to the law of Upper Canada, should have entitled him to an acquittal and judgment in his favor; and if the facts are such as ought to have led to such a result, they form a good defence to the action on the plaintiff's judgment here. Then as to the facts stated, that the judgment was recovered for certain trespasses alleged to have been committed in taking and carrying away certain timber in the district of Niagara, said to belong to plaintiff; that before such seizing and taking, the defendant was, and always since has been sheriff of the district of Niagara; that one Henry Tanner, an absconding debtor, was indebted to the other defendant Davis in the sum of £500 before such seizure; that Davis, pursuant to the statute, procured a warrant, to be issued out of the Court of Queen's Bench, directed to the defendant as such sheriff, commanding him as sheriff to attach, seize, and take, and safely keep, all the estate, real and personal, of the said Henry Tanner, which warrant was delivered to the defendant as sheriff, to be executed; that the defendant Wm. Kingsmill, as such sheriff, under the said

warrant, on the 20th of June, 1846, did, within the district of Niagara, in performance of his duty as such sheriff, attach and take divers quantities of timber of the said Henry Tanner. This so far must be regarded as inducement and necessary to be stated as explanatory of other facts which follow; that the plaintiffs claimed and pretended to own the said timber by virtue of a sale thereof made to them by Tanner after the issuing of the said warrant of attachment and the delivery thereof to him, the said Wm. Kingsmill, as sheriff, and while the same was in full force, and the said timber in the district of Niagara: whereas the defendant Wm. Kingsmill avers that at the time of the said attaching and seizing, the said timber was, by the laws of Upper Canada, the property of the said Henry Tanner and subject to such attachment : and that the said attaching, seizing, taking, and carrying away, are the taking and carrying away for which the plaintiffs recovered the judgment in the first count mentioned.

It was necessary for the defendant to state those facts, not for the purpose of giving color to the plaintiff's claim, but in order to give the court a knowledge of the nature of the trespass for which the judgment was recovered against him in the foreign court, inasmuch as the judgment itself gives no information on that head. The plea alleges that defendant, in the discharge of his duty as sheriff, under a proper warrant, attached certain timber of one Henry Tanner; and that the action of trespass was brought for the seizure of that timber, which the plaintiff claimed and pretended to own by virtue of a sale thereof made to them by Tanner, after the issuing and the delivery of such attachment to the defendant, as sheriff, and while it was in full force.

Now I confess myself unable to discover any admission made in this part of the plea, that a sale of the timber was made to the plaintiff by Tanner after the issuing of the attachment, or at any time. The plea says the plaintiff pretended to own the timber under such a sale, and then it avers expressly that the timber was, by the laws of Upper Canada, the timber of Henry Tanner, and liable to the attachment. I am, in this, at a loss to perceive any acknowledgement of any sale by Tanner to these plaintiffs, of

the timber seized. The claim of plaintiffs is not admitted by the allegation that they pretended to own-under a sale, and when the defendant, immediately after the statement of such claim, alleges the timber to have been at the time of the seizure that of Henry Tanner, it appears to me difficult to construe the facts so set forth, as amounting to admission of the plaintiff's right under a sale. The defendant alleges that by the laws of Upper Canada the timber at the time of the seizure was that of Henry Tanner, and it is argued that by the introduction of the words "by the laws of Upper Canada," it is shewn that the defendant meant to allege that a sale made to plaintiffs after the delivery of the attachment to him, would not transfer the timber to the plaintiffs, but would leave it still the property of Tanner, and liable to the attachment.

If indeed such sale were distinctly admitted by the defendant, there is no doubt that his plea would be bad, because it would amount to an admission of the plaintiff's right of action; as it would be assumed, there being no allegation to the contrary, that the sale was made before the seizure. The words "by the laws of Upper Canada," do not seem to me materially to vary the sense, or to afford much additional light as to the meaning and intention of the plea; and though they might have been omitted, they do not appear to militate against the plea.

The plea alleges that the cause of action arose in the district of Niagara, where the defendant was resident: that the defendant has always been a British subject, and never did reside in or was domiciled in the United States, or elsewhere within the jurisdiction of the court of Common Pleas for the county of Erie, and never was subject to the laws of the United States for or on account of the said alleged cause of action: that, according to the laws of Upper Canada, the said cause of action did not and does not give to the plaintiffs any cause or right of action against him, and he was not liable to be prosecuted therefor; and further, that the said court of Common Pleas in the declaration mentioned, wrongfully and corruptly, and contrary to natural justice and right, although the facts stated in this plea were offered and proved

as a defence for the defendant Kingsmill, at the trial of the said cause in which the judgment is recovered, refused to admit the said facts or any of them as a defence.

Now the facts which the defendant alleges the court refused to receive as a defence are briefly these—that the defendant seized a quantity of timber belonging to one Henry Tanner, under a writ, as sheriff, which timber the plaintiffs pretended to own; that by the laws of Upper Canada he was not liable to any action for such seizure; and he alleges that all this was proved before the said court upon the trial, but rejected by the court, wrongfully, corruptly, and contrary to natural justice and right. Surely, if the defendant proved that the timber was Tanner's, that he seized it as such, and that for such seizure he was not liable to any action at law in Upper Canada, that must have been a sufficient defence in the action of trespass of the plaintiff; and being rejected there, the defendant is entitled to urge it here, when the plaintiffs come here to have their judgment enforced.

As to the necessity of setting out the pleadings, in order to see that such defence was available, I think, when it is alleged that certain facts were offered and proved, we must assume that the proceedings were such as to admit of such proof being received, and that this objection ought not to prevail. I concur therefore in the judgment of the Chief Justice and Chancellor, that the 8th plea sets out sufficiently, a good cause of defence. This opinion I had formed on hearing the argument in the court of Queen's Bench; but no judgment was given by me, in consequence of my removal from that court; and, though I have heard the matter much argued and discussed since, I have been unable to come to any other conclusion. At the same time, seeing the strong view which has been taken by some of my brothers in reference to the 8th plea, I am free to admit that I do not come to this conclusion with the same confidence as when called upon to decide upon that plea in the court of Queen's Bench.

ESTEN, V. C.—I think the meaning of this plea is, that notwithstanding the sale to the plaintiffs, which under other circumstances would have been perfectly good, they had no

title by reason of the attachment: that the defendant insisted upon this before the foreign court; but that court decided according to their own law, and refused to admit as a defence what would have been a defence by the law of Upper Canada, as the plaintiffs were not British subjects; and that this was contrary to natural right. I think the plea means that the judgment was according to the laws of the United States, but insists that the defendants were not subject to those laws; that is to say, either that the court ought not to have taken cognizance of the matter at all, or ought to have decided according to our law.

The law regarding the obligation of our courts to enforce foreign judgments seems tolerably clear. It is admitted that where an attempt is made to enforce a foreign judgment in our courts, it is examinable, but is prima facie valid and binding, and furnishes a good cause of action. In truth every presumption is to be made in its favour; and if it can possibly be right under the circumstances which appear, it is the duty of our courts to allow it to be enforced. I have seen no reason to suppose that a sheriff committing an illegal act in the execution of his office in this country, for which by our law he is civilly responsible, may not in reason and justice be equally responsible in a foreign country where he happened to be, whose courts have by its law, jurisdiction over the matter, where he is served with process and has had every opportunity of defending himself, and where due effect is given to the law of the country in which the act was committed.

Now suppose for a moment that sheriff Kingsmill's view of the law is incorrect, and that the circumstances upon which he relies afford no justification of his conduct. The present appears to be a case of this nature. The supposed wrong is committed in Upper Canada; the sheriff who has committed it visits the United States, where the party complaining of it resides, and is there sued by him in a court which may have, and must be presumed to have, by the law of that country, jurisdiction over the matter; he receives due notice of the proceedings; has every facility allowed him for proving, and does in fact prove all the facts upon which

he relies, and judgment is pronounced against him. The single ground on which, with any shew of reason, this judgment is impeached, is that the foreign court did not, in pronouncing it, allow due effect to the law of the country, by the law of which it should, in reason and justice, have been regulated.

There is much reason to infer from the statements in the plea, which are admitted to be true, that the foreign court believed the evidence adduced by the defendant respecting the law of Upper Canada, and intended to decide, and thought it was deciding, in contravention of that law. If it has in fact done so, the judgment which it has pronounced must be admitted to be contrary to natural reason and justice, and ought not to be enforced in our courts. If, however, its judgment is conformable to our law, and is the same as must have been pronounced in our courts upon the same matter, then the foreign court mistaking our law and believing that it was deciding in opposition to it, will not invalidate its judgment.

Now I understand the law of this province to be, that an attachment binds the property only from the time of seizure, and does not operate by relation to defeat a prior bona fide sale of it. This plea, I think, alleges a sale of the timber in question, between the issuing of the attachment and the seizure; which sale, as it is not impeached, must be intended to have been a bona fide one; which it may well have been. For if Warrener purchased the timber for a valuable consideration, without notice of the attachment or of Tanner having absconded, the sale would be valid; and in this case the title of the purchaser would prevail over the attachment; and if the action had been brought in this country instead of the United States, the judgment must have been the same as that which forms the ground-work of this action.

This judgment therefore appears to be conformable, not only to the law of the country where it was delivered, but to our own law and to natural reason and justice, and cannot be invalidated by any misapprehension of our law by the foreign court, or any supposition on their part that they were not deciding in accordance with it, or any intention not to give due effect to it. The foreign judgment is prima facie a sufficient consideration to support the implied promise on which the action is founded, and no sufficient matter has been alleged to displace it.

Burns, J .- In dealing with this case on a former occasion I then assumed, and still assume—for I have nowhere met with any authority against it-that every person who may be sued, no matter in what court or on what account he may be sued, is bound to defend himself so far as he can, because he has no right to assume or presume that the court, before which he may be summoned, will not fairly try the case and award justice. The appellant, it would appear, must have felt the force of this; for he did, as he tells us, appear in the foreign court, and offered to, and did prove certain matters in his defence; and I did not understand, nor do I now understand the plea to be to the effect that he questioned the jurisdiction of the foreign court to entertain the suit against him, simply because he was a sheriff, and acting as such in the execution of his duty under legal process in this Province; but he rested his defence, as he plainly tells us, on the ground that the goods, in respect of which the suit in this foreign court was brought against him, were the goods of Tanner, against whom he had the process, and that by the laws of this Province the goods were Tanner's.

The respondents, in order to have sustained their action, must have shewn themselves to have been entitled to the property, either by proving their title to it, if that were disputed, or upon the appellant's admission of that fact, if the title were not in dispute by the issues raised; and whether the respondents were the owners of the property or not, most certainly was a matter which the foreign jurisdiction had a right to try.

The appellant tells us that he did defend himself, and from what he has stated, it would seem that he attempted to defend himself on grounds similar to what he would have been obliged to do if the respondents had sued him in our courts; but he says that the foreign court, in trying and disposing of the question, acted corruptly and against the course

of natural justice, and it is this which the appellant has now undertaken to establish in his plea.

It must be assumed, in the first instance, that all matters of fact which were necessary to enable the respondents to obtain a judgment were, in consequence of their having the judgment, sufficiently established for the purpose; and a judgment being obtained, a legal obligation arises to pay the sum awarded, which must be enforced by permitting anaction on the judgment in our courts, unless that legal obligation be displaced by the respondent shewing us that the foreign court did act corruptly and contrary to the course of natural justice.

Baron Parke, in Williams v. Jones (13 M. & W. 628), says, "the principle on which this action is founded is, that when a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.—Vide Russel v. Smith (9 M. & W. 810.)

I was and am of opinion that the judgment is not conclusive, but that it is open to the person against whom the judgment operates, to shew that by our laws and by the laws of the country where the judgment was obtained, it was obtained contrary to the course of natural justice; and the question now is, whether this plea is sufficient to displace the legal obligation arising upon the judgment, or does it allege circumstances and facts from which we must say the original merits must again be tried; or, in other words, that we cannot allow an action on the judgment itself to be sustained, because that judgment was obtained against the course of natural justice. Whether the judgment is to be opened or not, is a question of law upon the facts admitted, or if disputed to be ascertained upon trial.

The respondent says the facts stated in this plea were proved and received in the foreign court, but were not acted upon. Whether the proceedings were conducted ore tenus or by written pleadings we are not informed; and whether the matters which the appellant says were offered and proved in evidence could, under the points which he may have raised

at the trial, have been properly received in evidence, we are left altogether ignorant. The plea does not assert that the matters of the appellant's defence, as now put, came on to be tried, in the course of which he offered to and did sustain them by the facts mentioned; nor does he say that he was prevented from defending himself on the grounds alleged, or that he misconceived his defence, and would now wish to rectify it; but the appellant has simply said that he offered to, and did prove the facts alleged, but though proved and received they were not acted upon, and leaves it to be inferred from that fact, that the foreign court acted corruptly and contrary to the course of natural justice. It is quite consistent with all the appellant has said, that he had not, either from his negligence to defend himself properly, so as to raise the question before the foreign court, or for some other reason, placed himself in the position of having the facts he says he proved, acted upon; and I think he does now ask too much, when he asks an inference to be drawn in his favour from what is stated in this plea.

If the inference were inevitable from the facts, and all other possible circumstances than the facts stated negatived, then undoubtedly it is legitimate for the court to draw the inference; but if there may exist facts which would authorize and warrant the judgment, then I can see no principle which would authorize the assumption of an inference from stated facts, even though that inference may be just, which can be received to displace the legal obligation to pay the judgment.

Every intendment is to be made in favour of the judgment, and there can be no intendment against an intendment, and no room must be left for doubt as to the legal conclusion of an inference. The inference which the appellant desires should inevitably flow from his premises stated, is, that the foreign court acted corruptly and contrary to the course of natural justice; and as a conclusion of law, I cannot say whether that must necessarily be so, without seeing the points in issue between the parties raised before that court, upon the pleadings, if there were any, or if there were not, without being told that such was the case, and that the points which the appellant desired to be established by his facts stated

could have been received, or that he was prevented from establishing his defence; or I will even say that if he had misconceived his defence, and shewn how and in what manner he had so done, it might have been a reason for not enforcing the judgment, but rather to compel the plaintiff to try the merits of the case. I thought the plea faulty in this particular, and I have not changed my mind.

Suppose, however, it may be thought not necessary under this plea, as it is framed and worded, for the appellant to shew what the pleadings were, if there were any, or any other state of proceedings than is shewn to have taken place in the foreign court, then the question will be whether a sufficient case is stated to open the judgment as to the merits of the case. As the appellant does not complain against the judgment because it was obtained behind his back or without his having an opportunity to defend himself, or that he defended himself upon wrong grounds, and would now wish his defence to be set right, he has, as he must necessarily do, attacked the merits of the decision of the foreign court.

It is important to ascertain in such a case, what circumstances are necessary to be shewn, and how far the appellant has complied with that necessity, to convince us that the decision of the foreign court is contrary to our laws or to natural justice.

The declaration in this case, simply relies on the prima facie legal liability arising from the judgment; and to displace that liability, the defence must shew from and under what circumstances the liability arose; and before any opinion can be expressed as to the legality of the decision, it is necessary to know the right and title which both parties set up to the subject matter of dispute, and then, in the disposal of such title, the points or matters upon which the court did wrong and committed injustice. Where the decision is attacked intrinsically upon the merits, I take the proposition, as stated, to be incontrovertible. The plea is not faulty, however, on the ground of non-compliance with this rule, for it has attempted to fulfil it: but the true question is, whether in doing so, it has fallen short of, or stated more than was necessary.

To judge correctly of this we must clearly understand what facts the plea relies upon: that is, what has been asserted in it, and its true meaning.

The appellant does not say he rested his defence upon the ground that he was acting as a sheriff in this country in respect of the property seized; and for that reason the foreign court had not, or ought not to have exercised any jurisdiction; and in fact I do not see that he could have rested his defence on such ground, because if the property seized belonged to the respondents, the fact of the appellant being a sheriff would have been no protection to him in our courts, and if not here, I am at a loss to find any satisfactory answer to the question which may be asked, why such fact should protect him in any particular place or locality. A wrong done to the person, or to personal property which follows the person, is as much a wrong in one country as it is in another, and jurisdiction is acquired by the courts of one country over such wrongs committed in another, not forcibly, but by the voluntary acts of the parties themselves.

It is asserted that the foreign court would not listen to the appellant's evidence proved, because the respondents were citizens of the United States. Whether the foreign court gave such absurd reason for the judgment is not the question; but the question is, whether the facts set forth do or do not successfully impeach the decision. It is plainly enough stated in this plea, that the property seized was the property of the person against whom the sheriff had the writ of attachment, and it is plainly enough stated that the appellant acted in his duty in taking the property. This is the right and title on one side, and upon the other side the plea asserts that the respondents claimed and pretended to own the property by virtue of a sale from the person against whom the warrant of attachment had issued. The appellant does not tell us that nothing passed by the sale, or that he contended, or now contends that the sale was void for any other reason than that the warrant of attachment avoided it by reason of priority. If it be a correct proposition that in impeaching a judgment on the ground of an illegal decision on the merits, it is incumbent to shew the title of each litigant

party to the *corpus* of the suit, then it is likewise incumbent that the *reason* why the title of the successful party should not have succeeded, should be also shewn. The plea by no means shews that the sale of the goods to the respondents was a mere pretended sale, nor is the validity of the sale questioned in any other way than by priority of the attachment. It is not stated how or in what manner the sale was questioned, or the validity of it denied, in the foreign court, and we are left to suppose it must have been denied to be effective, for the reason stated in the plea.

This brings me to state what, in truth, is the reason alleged in this plea, why the sale of the property to the respondents must be held to be avoided.

It is stated that Tanner, the owner, was an absconding debtor; that the timber was his; an attachment was issued against him; and that the timber being Tanner's, the appellant seized and took it; and that at the time of attaching, the respondents claimed and pretended to own it, by virtue of a sale thereof made to them by Tanner after the issuing of the attachment and the delivery thereof to the sheriff; and that by the laws of Upper Canada the property was Tanner's and subject to the attachment.

This language is as plain, I think, as it well could be, to mean that it is admitted that Tanner made a sale to the respondents, which sale was avoided by the effect of the attachment; and does not mean that a sale was disputed, as also that if there were one, it was avoided by the effect of this attachment. If the respondents had no title whatever to the timber, then in an action of trespass in our courts, the defence would have been not guilty and not possessed; but after judgment, and the defendant questioning the judgment on the ground of want of title, and an illegal decision upon that point, the plea would certainly have stated that the plaintiffs had no title, and that the defendant proved that fact, and yet that an illegal judgment was given. Instead of that being so, we find both parties claiming title from and under Tanner; one by reason of a sale of the timber, and the other under the process of attachment; and I am altogether unable to put any other construction upon this plea, than that the

appellant intends to contend that the attachment had the priority, and that by the laws of Upper Canada the property was Tanner's, and was subject to the attachment notwithstanding the sale.

The plea may be tested in this way: I take it that if the facts shewn be sufficient to open the judgment, then that the plaintiff would be compelled to take issue, either by denying that the facts alleged were in contest and adjudicated upon by force of the judgment, or must now contest the truth of the defendants' assertion respecting those facts, and the plaintiff in doing so would, I think, only be fortifying the judgment. Looking at it in that light, and considering this plea then as one to the original cause of action, and that this plaintiff had objected to the plea as not being in confession and avoidance of the title of the plaintiff, the answer of the defendant would be this, that not only does the plea give the plaintiff colour of title, but it confesses an incontrovertible title, unless displaced by the operation of the attachment, and it appears to me the answer could not be refuted.

The plea admits a sale, and the expression that the plaintiff pretended to own by virtue of the sale, does not the less make it a sale; and if a sale, then a right is conferred upon the plaintiff, which right is said to be pretended and only displaced because of a legal principle deduced from the other facts set forth.—Vide Comyns v. Boyer (Cro. Eliz. 485), Carr v. Hinchcliffe (4 B. & C. 547), Fancourt v. Bull (1 Bing. N. C. 681), Unwin v. St. Quintin (11 M. & W. 277).

The plea confessing the plaintiff's title to the property, and only avoiding it by alleging that, in consequence of Tanner being an absconding debtor, and an attachment being issued against his estate and effects, and that the plaintiff claimed title by reason of a sale after the delivery of the warrant of attachment to the sheriff, and that by the laws of Upper Canada the property was Tanner's, and subject to the attachment, reduces the whole question then to this, from what time a warrant of attachment binds the property of an absconding debtor.

According to the plea this must—if the plea means anyk—vol. XIII. Q. B. thing, and that we can decide fairly upon it without seeing the points in issue, and which were tried in the foreign court—be the matter decided in that court. Whether that point were decided in favor of the plaintiffs on the ground of their being citizens of the United States, can be of little moment, if by the laws of Upper Canada the sheriff under such circumstances could not seize the property.

It appears to me the whole scope and object of the attach. ment given by the legislature to claimants against absconding debtors, was either to compel the debtor to appear and put in bail to answer the suit, or, as the preamble of the statute says, to afford the means that the property may be taken in execution and sold for the benefit of the creditors. surely never have been intended to give to the warrant of attachment a greater latitude in binding the goods than they would be bound upon execution; for the claimant can derive no benefit whatever from the attachment itself, unless he proceeds to obtain a judgment; and then execution, as the law declares, shall follow, as hath been the custom in the courts of this province. The question now to be determined is, whether the attachment shall have so great an effect as an execution, or does it bind only from the time the sheriff seizes and takes?

The delivery of an execution to the sheriff does not change the debtor's title in his goods. He still may sell and convey them subject to the execution, though if the goods be sold in market overt, the right of the sheriff ceases. The provisions of the Statute of Frauds with respect to executions are these -" that no writ of f. fa. or other writ of execution shall bind the property of the party against whom such a writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff;" and the provisions respecting the attachment are-" that upon receipt of which warrant the sheriff to whom the same may be directed shall forthwith execute the same," and immediately after making the seizure it is the duty of the sheriff to cause a notice to be inserted in the Gazette. The execution issues upon a judgment already obtained, but the warrant of the attachment is an ex parte proceeding upon proof of the debtor having absconded or

concealed himself, and it is for the purpose of attaching the goods that the same may afterwards be taken in execution. The attaching, I think, clearly means a seizing and taking, and it is only after a seizing and taking that the notice is to be given by the sheriff, which will bind those having property of the absconding debtor as the law declares.

I am clearly of opinion the mere delivery of the warrant of attachment to the sheriff is not sufficient, but some act of the sheriff must be done in order to bind the goods, and that if a sale bonâ fiide be made before a seizure, or what may amount to a seizure by the sheriff, the property will pass.

I have confined my remarks to personal property, as it is that description of property which is involved in this suit, but the warrant of attachment applies equally to lands, and many difficult questions might arise if this operation of the attachment were extended to the delivery of the writ to the sheriff.

For these reasons the plea, in my opinion, wholly fails to shew a case for questioning the correctness of the judgment. My views may be shortly reduced to this proposition, which I take to be the result of the cases—that a foreign judgment sought to be enforced here, is to be presumed correct, and that a legal obligation arises thereon which should be enforced; that it may however be impeached either by intrinsic or extrinsic evidence; and if it is impeached by extrinsic evidence, then two things are requisite, first, that the party impeaching it must shew that he was altogether ignorant of the proceedings to obtain the judgment, and therefore not bound by it, in which case he must negative all and every possible circumstance on which the judgment might be sustained; and secondly, if the party has appeared and defended himself, then his extrinsic attack should be accompanied by the extrinsic evidence of what the pleadings were, if any, or the points raised, and which came on for trial, by whatever means and process the same came on, and the points disposed of, and how, by the court. Independent of this proposition, if we try the plea by our own rules of pleading, the appellant fails to impeach the respondents' title to the property in question, and consequently does not impeach the judgment.

Spragge, V. C.—The questions raised upon the eighth plea are, whether the foreign court had jurisdiction of the subject matter; whether, if so, its judgment can be impeached, upon the merits; and again, if it can be so impeached, whether the matters alleged in the plea, taking them to be true, as they must be taken upon this appeal, form sufficient grounds for impeaching that judgment, so that the court below should not give effect to it. And herein it becomes necessary to consider whether the attachment under which the respondent acted had any relation back to its teste, or to its being placed in the sheriff's hands, or only took effect from the time of its laying on, or being actually executed by the sheriff; and if it had no effect by relation, then it is necessary to consider whether the plea alleges an actual or a pretended sale from Tanner, the absconding debtor, to the appellant.

There is certainly this peculiarity in the case appealed from, that it seeks to give effect, by the aid of the courts in Canada, to a judgment obtained in a foreign court, upon a cause of action, if any, arising in Canada, and growing out of the exercise of an official function by a public officer of Canada. It is, however, one question whether the foreign court had jurisdiction over the subject matter, after process served upon the defendant within its jurisdiction; and quite another question, whether this court will hold the judgment of the foreign court not conclusive, and examine whether the public officer, whose act was questioned by that court, acted within the scope of his duty as such public officer, and so would be entitled to protection, and would in his own country receive protection for that act

The suit in the foreign court not being in respect of immovable property, and the defendant as well as the plaintiff being within the limits of its jurisdiction, that court had, it is agreed primâ facie cognizance of the suit. Story, in his Treatise on the Conflict of Laws, lays it down that in this respect there is no distinction whether the suits are between citizens, between foreigners, or between citizens and foreigners, but that all are upon the same footing; and I do not find that the circumstances of the defendant acting in a public capacity in this country, in respect of the act complained of in the suit of the foreign court, exempts him from the juris-

diction of the foreign court in a case otherwise within its cognizance.

If the sheriff of the county of Erie were served with process in Canada, in an action of trespass for seizing and taking goods the property of a resident in Canada, I do not think that a plea that he was sheriff of Erie, and as such sheriff seized the goods in question, under process of the State of New York, would be a good plea to the jurisdiction of the Court of Queen's Bench. If so, it would be a good plea whether the process were against the goods of the plaintiff in the action here, or against the goods of some third person whose goods he alleged them to be; because the plea would be, not that the process authorized the taking, but that the party taking being sheriff and acting as such in the taking, his acts were not to be questioned beyond the courts of his own country. To allow such a plea would be to refuse to try whether the defendant did not, under a color of a writ against the goods of a third person, seize and take the goods of the plaintiff; and if such a plea would be good at all, it would be good always, even where the sheriff had resigned or been deprived of his shrievalty, and became permanently domiciled in the same country as the person whose goods he had seized. Unless that court is prepared to hold that such a plea to the jurisdiction could be good, it must, I think, be held that the defendant in the court below, was bound to justify his taking under process of a competent court in Canada, and that the goods at the time he seized them, were the goods of the person whose goods he was commanded to seize by the process under which he justified. I cannot see that there is any middle course between allowing such a plea to the jurisdiction as I have supposed, and holding the defendant bound to justify his act under process which authorized the act. I think that the foreign court had jurisdiction, and the next question is, whether it can be enforced in the courts of this country, and if so, whether it is to be taken as conclusive, or whether, upon an action upon that judgment brought in Canada, it is open to defendant to shew that upon the merits the judgment ought not to have been against him?

I do not purpose to go through the several authorities upon this point; and indeed, in my view of the case, it is not absolutely necessary to determine it. The tendency of modern decisions appears to be to hold foreign judgments conclusive upon the merits, and only impeachable where the foreign court had not jurisdiction, or the defendant was not duly summoned to answer, or the judgment was obtained by fraud. The notes to the Duchess of Kingston's case, in Smith's Leading Cases, contain a summary of the decisions upon the subject; the case of The Bank of Australasia v. Harding (14 Jur. 1094), and the more recent case of The Bank of Australasia v. Nias (15 Jur. 967), all bear in favour of the conclusiveness of foreign judgments.

It is observable, however, that in all the cases where the foreign judgment has been held conclusive, the cause of action has arisen within the country of the court which has rendered the judgment; and great weight has justly been given to the consideration, that if the court in which an action upon a foreign court has been brought, were to inquire into the merits of that judgment, it would do so under great disadvantages, and with inferior means of arriving at the truth and justice of the case than were possessed by the court by which the judgment was rendered; and so it has been said with great force, that "invariable experience shews that facts can never be inquired into so well as on the spot where they arose; laws never administered so satisfactorily as in the tribunals of the country governed by them."

Precisely as this language is forcible for the conclusiveness of judgments in the cases to which it refers, it is forcible against the conclusiveness of judgments rendered in the courts of countries where the cause of actions did not arise, and when sought to be enforced in the country where the cause of action did arise.

Mr. Story in his "Conflict of Laws," at sec. 613, quotes an observation of Boullenois, a French writer on civil law, which is applicable to this point. Boullenois holds that the judgment of a foreign court should generally be conclusive, and the only exception he makes is, where the plaintiff is a subject and the defendant a foreigner, and where he has not

entered into any contract in the place where the suit is brought, or into any contract which is to be performed there, and which is the subject matter of the suit: in such a case he says the judgment is not conclusive against the defendant. The case thus excepted by Boullenois is precisely the case here, without, however, the strong additional reason against the conclusiveness of the judgment, that the defendant is a subject of the country, and that the cause of action arose in the country where its conclusiveness is called in question upon its being sought to be enforced there, and where certainly its merits can be best examined.

Without quoting M. Boullenois as authority, it is still a circumstance worthy of observation, that the single case which he excepts from the general rule is one in which it has not as yet been held that a foreign judgment is conclusive, and that that excepted case agrees with the case here, with the exception of the case being a stronger one for the same position. In accordance with this, too, is the general principle laid down by Vattel, that it is the province of every sovereignty to administer justice in all places within its own territory, and under its own jurisdiction, to take cognizance of crimes committed therein, and of the controversies that arise within it."

It would certainly be in contravention of this principle for the courts of a country to refuse to take cognizance of a controversy that arose within that country, merely because a foreign court had taken cognizance of the same controversy, and that when its aid was invoked in respect of the same controversy by one party, and an inquiry into the merits of the controversy asked by the other.

Up to the decisions of the case of the Bank of Australasia v. Nias, in January, 1851, it was considered an undecided question whether a foreign judgment was conclusive or not. This is apparent from the language of the court,—Lord Campbell said: "It may be enough to say that the dicta against retrying the cause are quite as strong as those in favor of this proceeding; and, being left without any express decision, now that the question must be expressly decided, we must look to principle and expediency."

In that case great stress was laid upon the circumstance of the foreign judgment being the judgment of a colonial court, from which an appeal lay to the Queen in council. "A regular mode," as the court say, "having been provided by which an erroneous judgment of a colonial court may be examined and reversed, that mode ought to be pursued." The inconveniences of submitting the matter to a jury are pointed out, and it is remarked that no hardship whatever is cast upon the defendant by requiring him to follow the course to obtain redress against an unjust and erroneous judgment, which the law has provided for him. The cases are put of a judgment given by a court in a foreign country, or in a court of one of our colonies, governed by foreign law; and it is asked, how is the cause to be re-tried at Nisi Prius?

It is clear from the question, that the judgment of a foreign court upon a cause of action arising in a foreign country and governed by foreign law was in the view of the court.

The reasoning of the court in the case to which I refer is forcible in relation to the fact of that case, and in relation to the cases supposed, but is wholly inapplicable to the case in question here. I do not look upon that case as an authority for the conclusiveness of a foreign judgment, when the cause of action did not arise in the foreign country, still less where it arises in the very country where it is sought to be enforced. In such a case the reasoning of the court in that case wholly fails.

I do not think it is any where laid down that the English courts are bound to enforce the judgments of foreign courts; they do so in furtherance of justice; and when in an action on such judgment, the defendant impugns the judgment on the ground that the merits of the case are with him, not with the plaintiff, he raises a question much more proper for the decision of the foreign court than of the court in which he desires to raise that question. This, as a general rule, because, as a general rule the cause of action arises abroad. But when a defendant raises that question in the courts of a country where the cause of action arose, he raises it in the place most proper for its decision, whether it has been decided

upon in a foreign court or not, and the reasons for refusing to try the merits in the one case are strong reasons for not refusing it in the other.

It is, I think, scarcely possible to conceive a case in which it would be a greater hardship upon a defendant to hold him concluded by the judgment of a foreign court from shewing his defence here, than in such a case as this. And I think too, that it would be equally at variance both with principle and expediency, the two grounds on which the court avowedly founded their judgment in the case of the Bank of Australasia v. Nias.

Then, supposing it to be open to the defendant to shew that the alleged trespasses, for the committing of which damages were awarded against him in the foreign court, were acts which he was justified in doing; does he shew this? defendant alleges that the plaintiff at the time of the said attaching, claimed and pretended to own the said timber by virtue of a sale thereof made to him, the said plaintiff, by the said Tanner, after the issuing of the aforesaid warrant of attachment and the delivery thereof to the said defendant Kingsmill, and while the same was in force. I take the plea to state and admit a sale of the timber from Tanner to the plaintiff, and that such sale was after the delivery of the attachment to the sheriff, and before he attached the timber. If after the attaching, the defendant would have so stated it; and, besides, the words that the plaintiff at the time of the said attaching claimed, &c., clearly fix the time of the sale as prior to the seizing under the attachment.

The defendant thus states facts which he conceives justified him under the attachment in seizing and taking the timber. If the process in his hands had been a writ of fieri facias instead of an attachment, a seizure by the sheriff after a sale made subsequent to the delivery of the writ would have been justifiable. By his plea he has justified, and he no doubt acted as if an attachment and a fieri facias stood in that respect upon the same footing.

I have read the plea attentively, in order to ascertain what it must be construed as alleging in respect to a sale of the

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timber; whether an actual sale is admitted, or a pretended sale stated. The word "pretended" is only used in relation to the plaintiff's alleged ownership; "he claimed and pretended to own;" and then the plea shews upon what ground the plaintiff claimed and pretended to own-"by virtue of a sale thereof made, &c., not treating the sale as a pretended sale, but treating such a sale at such a time as not transferring the property; but that by virtue of such a sale, the purchaser could only claim and pretend to own the property Even if the allegation in the plea had been inserted only by way of giving color, it would not, as has been already shewn, be on that account the less binding on the pleader. Whether the doctrine of giving express color would apply to a plea of this nature, which is not a plea to an action of trespass, but to an action of assumpsit on a foreign judgment for alleged trespasses, I express no opinion. I think the language of the plea plainly imports a sale, and that without the aid of a familiar rule, that where the language of a pleading may be taken in more senses than one, that sense shall be taken which is most against the pleader.

The allegations in the plea that the timber when seized was the property of Tanner; that it was then subject to the attachment; that by and according to the laws of Upper Canada, the taking and carrying away did not give to the plaintiffs any cause of action against Kingsmill, and that he was not by the said laws liable to be prosecuted therefor, do not, in my judgment, help the plea or vary the effect of the facts which the plea sets forth. Those allegations as to the property in the timber, and the non-liability of Kingsmill, are not, as I read them, allegations of facts, but of what the appellant takes to be the law of Upper Canada; and the facts set forth in the same plea shew the appellant to be wrong in his law, unless the timber was subject to seizure by the sheriff, notwithstanding a sale thereof between the delivery of the attachment to the sheriff and the seizure by him; or, in other words, unless the attachment affected the goods by relation before actual seizure. Upon this point, but little has been said in argument, but the matter has been very carefully examined by members of the court.

Looking at the Provincial Statutes which constitute the attachment law of Upper Canada, and the law in relation to writs bearing the nearest analogy to our warrant of attachment, I think that with us the attachment has no effect by relation. I should have thought it necessary to go more at length into this point, upon which, according to my view, the whole case turns; but that the learned and elaborate judgment of Mr. Justice Sullivan renders it unnecessary. I concur in the views which he has upon this point so ably expressed.

The eighth plea discloses matter which, if the action of trespass had been brought in Upper Canada, instead of the state of New York, would not by the law of Upper Canada have been a good defence. The facts stated in the plea were, as the plea alleges, offered and proved as a defence for the appellant at the trial in the foreign court, and the appellant's complaint is that the foreign court refused to admit such facts as a defence, and declared and adjudged that the appellant could not defend or justify himself thereby, or by his position or duties as such sheriff under the said attachment; and that the claim of the plaintiff to the timber was not and could not be affected by such attachment, or by the facts stated in the plea.

If such decision was in accordance with the law of Canada, if he proved in his defence, facts which in law were no defence, and would have been no defence in Canada, then the merits of the foreign judgment have been opened and examined here, and the appellant is in that respect, in the same position as if he had pleaded the same facts in an action of trespass brought in Canada, and that plea had been demurred to.

The reasons alleged in the plea to have been given by the foreign court for their judgment appear strangely unsound; but, as was observed by Mr. Justice Draper in the court below, "If the judgment is correct on the facts relied upon for the defendants, it matters little whether the reasons upon which the plea alleges it was founded are solid or not." The judgment of the court below upon the eighth plea, is the only part of that judgment which has been impeached by counsel

in argument, and I suppose therefore that the judgment of the court upon other points is not appealed from.

My opinion is, that the eighth plea is bad in substance, and that the judgment of the court below must be affirmed.

DRAPER, J., adhered to his opinion as contained in his judgment in the Queen's Bench.

SULLIVAN, J., delivered a judgment, concurring with the majority of the court, but the reporter has been unable to obtain it.

Appeal dismissed, with costs.

IN APPEAL.

Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Mr. Justice Sullivan, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge.

ON AN APPEAL FROM THE QUEEN'S BENCH.

MINK V. JARVIS.

Sheriff, how far bound by warranty of his deputy, of goods sold under fi. fa.

In an action against the sheriff as upon a contract of warranty, by reason of his deputy having taken upon himself, without the knowledge of the sheriff, to warrant that a horse, which he was selling under a fi. fa. was really the property of the debtor against whom he had the writ.

Held by Robinson, C. J., McLean, J., Esten and Spragge V. CC., that the

sheriff was not liable.

By the Chancellor, Macaulay, C. J. C. P., Draper and Sullivan, JJ., that he was. Burns, J., gave no opinion.

The facts of the case, and the judgment in the court below, now appealed from, are fully stated in the report of the case, ante 8 U. C. R. 397.

On the 26th June, 1851, J. Duggan appeared for the appellant.

Vankoughnet, Q. C. for the respondent.

On the 26th February, 1852, the court directed this cause to be again spoken to by counsel.

Accordingly, on the 11th March, 1852, the nine judges being present,

J. Duggan again appeared for the appellant. Cameron, Q. C., for the respondent.

And on the 31st of March, 1852, the nine judges being present, the following judgments were delivered.

ROBINSON, C. J.—The facts of this case, which gave rise to the action in the court below, are stated in the report of the case 8 U. C. R. 397.

The question presented by it is, whether the sheriff is liable to an action, as upon a contract of warranty, by reason of his deputy having taken upon himself, without the direction or knowledge of the sheriff, to warrant that a horse which he was selling under a Fi. Fa., was really the property of the debtor against whom he had the writ.

The debtor's son had claimed the horse as his, and the sheriff had received an indemnity from the plaintiff in the Fi. Fa., which fact the deputy was aware of; and in order to satisfy the plaintiff that he might safely bid for the horse, the deputy sheriff assured him that the horse did belong to the debtor, and that he should be safe in buying him.

It did not appear that the deputy sheriff made any use of the sheriff's name, or did more than give the assurance in his own name, or as from himself; nor did it appear that the plaintiff understood him as giving any warranty on the sheriff's behalf. On the contrary, the plaintiff having afterwards an action of trover brought against him by the person who had claimed the horse, and being put to costs in consequence, brought his action in the first place against the deputy, who had given him the assurance of title at the sale, and not against the sheriff, but afterwards discontinued it, and sued the sheriff, probably under the notion, that if the sheriff could be held to be liable, his remedy was confined to him as principal officer (as it is in most cases), and that he could not sue the deputy.

That I believe to have been a misconception; for that the rule would not have applied in such a case, of an alleged contract made by the deputy, but only in cases of alleged wrongs by the deputy, whether of misfeasance or nonfeasance. And it has been an unfortunate misconception (if the action

against the deputy was unnecessarily abandoned), for it has led to an expensive litigation, upon what seems to be a doubtful question.

The deputy sheriff, on whose express warranty the plaintiff ventured to purchase, would, as I consider, be clearly liable in assumpsit upon this agreement, which it was really no part of his public duty to enter into, but by which he might undoubtedly bind himself, though it was out of the ordinary course. The plaintiff therefore was not and is not without remedy, and the case is only of consequence to the parties on account of the costs which have been incurred in seeking the remedy, against the sheriff himself; but it is of considerable consequence as it affects the general principle of the sheriff's liability, in a case of any warranty of this kind being given by his deputy.

I gave my opinion upon it at some length in the court below, and had given it much consideration, not being free from doubt when I gave the judgment, as I am not indeed now. I hoped that, on the argument of the point in appeal, we might have been referred to some authority, which the industry of counsel had discovered; but no adjudged case, nor indeed any dictum expressly in point, was cited, and the case is still to be disposed of by reasoning on principles.

My impression still is, that the action does not lie against the sheriff, on a warranty of title given by his deputy on a sale of goods in execution, when it is given without the direction, assent, or knowledge of the sheriff. The circumstance of this court being much divided in opinion on the point, makes it proper that I should state anything that has occurred to me, in addition to what I have already assigned as the reasons of my judgment. If a majority of the court had been clearly in favor of either party, I should not have desired to say anything further on the question.

I still do not think that the fact of the sheriff having taken an indemnity bond from the plaintiff in the Fi. Fa. makes him legally liable, as upon a warranty made by him, if he would not otherwise have been liable. It would have been a good reason why he might have authorised the deputy to come under the engagement that he did, and might have

furnished perhaps, some ground for assuming, in the absence of proof to the contrary, that he did allow it; but the evidence was clear, that the deputy did in fact give the warranty of his own accord, and without any direction or authority, or any knowledge that he intended to do so; and the mere fact of the sheriff holding the indemnity could not have the legal effect of enlarging the deputy's authority, so long as the sheriff did not give any direction about it. Plummer v. Whitchot (2 Mod. 123), though the case was not in other respects like the present, the effect of the sheriff having taken an indemnity, in making him legally liable, where otherwise he might not be, was considered. Sir Wm. Jones, then at the bar, contended in argument, that it could make no difference. "It might be an argument," he said, "at Nisi Prius, to induce a jury to find damages, but could not make a man chargeable who was not so before." The counsel on the other side, indeed, did not rely upon it, and the court did not advert to it in their judgment.

Then, placing that out of the question, the general principle is that, "in all ministerial acts, whatever is done by the under-sheriff is done by the sheriff;" but I take that to mean, ministerial acts that belong to the sheriff's office, that is, such acts as ought to be done by the sheriff, and respecting which the sheriff must see that they are done, and properly done; and that in doing, or attempting to do, or pretending to do them, his deputy does no wrong to others. Giving a warranty as to the title or quality of what he seizes and sells as a public officer, is no part of a sheriff's duty. There is clearly no claim upon him for any such warranty; and therefore, when his deputy without his authority gives it, and more especially when he does not expressly even give it in the sheriff's name, he is not to be looked upon, I think, or understood to be pledging anybody but himself. He may pledge himself if he will, because any man may make a contract which is not unlawful, and it will bind him, if made on a sufficient consideration.

In the case of Kitson v. Fagg (1 Str. 60) the question was raised, whether the under-sheriff could assign a bail-bond in the sheriff's name. The court held he could, because it was

clearly a proper and necessary act for the sheriff to do; and they said it had been the constant practice since the statute.

So in Doe dem. James v. Brawn (5 B. & Al. 243), where it was made a question whether the under-sheriff could execute a sealed assignment of a lease, which he had sold under a fi. fa., having no special authority from the sheriff to execute such a deed—the court held he could properly do it, virtute officii, it being a plainly necessary act of the sheriff's duty, necessary for perfecting the execution, and that it came within the terms of the deputation.

But can it be said that the deputy sheriff, in giving, in his own person in this case, an assurance that the horse he sold belonged to the debtor, was any more acting for the sheriff than if he had warranted the age, or soundness of the horse, or any particular quality that he might choose to ascribe to him? I think not.

The ordinary terms of the sheriff's deed appointing his under-sheriff are—that the under-sheriff is "to act, do and execute, what to the said office of under-sheriff shall belong or appertain;" and after enumerating a multitude of acts specifically, the form concludes, "and to do all other acts in the name of the said sheriff, that may be requisite and necessary in the due execution of the said office."

In Norton v. Simmes (Hobart 12), the court say "when the sheriff appoints his under-sheriff, he impliedly gives him authority to exercise all the ordinary offices of the sheriff himself; as to execute process."

But I have not been able to satisfy myself that the sheriff, either by the ordinary terms of the deputation, as I have recited them, or by implication, gives any authority to his deputy to pledge him to warranties in matters where he is acting as a public officer, and is supposed to be indifferent between the parties. We know that in fact, this is no part of the sheriff's duty, but wholly besides his office; and every one buying at a sheriff's sale is equally bound to know this; and when he asks for and obtains an assurance of this kind from the person making the sale, he should, I think, be looked upon as taking it with knowledge of the law, and in reference to it, and relying therefore only on the responsi-

bility of the person who made the promise, and who could no doubt bind himself.

In Cameron v. Reynolds (1 Cowper, 406) Lord Mansfield expresses himself strongly against there being any obligation to enforce promises made by sheriffs to do what it is no part of the duty of their office to do; and there is certainly nothing plainer than that it is no part of the duty of a sheriff to warrant the property in goods sold by him.

In Snowball v. Goodriche (1 Nev. & M. 234), it was sought to make the admission of the under-sheriff evidence against the sheriff. The fact to be proved was that one Bayley, who had executed a writ, was the sheriff's officer, employed for that purpose; and this the plaintiff endeavoured to prove, by shewing that the under-sheriff, while he was still in office, but after the writ was returned, had declared that Bayley was the officer of the sheriff, who had executed the warrant. The court held the evidence not admissible to charge the sheriff, because it did not accompany any act of duty done by the under sheriff, and formed therefore no part of the duty of his general agency. "The declarations of the bailiff," Lord Denman said, "are only admissible when they form part of the transaction. What difference is there between one agent and another?" The principle of that decision was that the under-sheriff, in making the declaration or admission, was not performing, either rightly or wrongfully, any act of his duty as under-sheriff.

When a writ of Fi. Fa. is delivered to the under-sheriff to be executed, it is to be looked upon as delivered to the sheriff. Of that there is no doubt. If therefore the under-sheriff neglects to execute it, the sheriff is liable for the omission, though he may never have seen or heard of the writ; so also if he proceeds to execute it. We are to look upon all that he does, in executing, or attempting to execute, or deceitfully pretending to execute it, as if done by the sheriff himself. If he takes the goods of A. instead of the goods of B. by mistake or by design, it is looked upon as done by the sheriff himself, and the sheriff is held liable, not only to the party whose goods are wrongfully taken by his deputy, but even to

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the party to whom the deputy has wrongfully sold goods, which he knew at the time did not belong to the debtor.

The case of Peto v. Blades (5 Taunton, 657) seems to go that length, for I take that to have been an action against the sheriff, and not against the auctioneer, though it is most confusedly reported. These cases all proceed upon the principle that the interests of suitors and others could not be adequately protected unless the sheriff, to whom the process is directed, will execute it himself, or entrust some one else to execute it, for whom he will answer: that is, as I take it, for whose conduct he will answer: that is, his conduct in executing or omitting to execute the process, or proposing or pretending to execute it. Thus in Peto v. Blades, the auctioneer appointed by the under sheriff, represented the sheriff in selling the goods: that is, he represented him for the purpose of selling them, which was an ordinary and necessary act required for making the money; while doing that act he stood in place of the sheriff, or rather the undersheriff did, whose servant the auctioneer was. The court therefore considered that the sheriff in effect, was then wrongfully exposing to sale goods which he well knew he had no right to sell, and they made him answer to the buyer for the injury. But the act, which was treated as if done by the sheriff in person, was not in itself an act beside the sheriff's duty-on the contrary, it was an act in immediate execution of the writ, though colorably and deceitfully done; it was the sale, which ordinarily takes place under a Fi. Fa., and every person present at it was well authorized in regarding it as the official act of the sheriff, who ought to have done and must have done just what was done, if the goods had been in fact the goods of the debtor, as his deputy wrongfully held them out to be, when he knew the fact was otherwise.

The principle on which these cases proceed was very fully discussed in Sanderson v. Baker and Martin, sheriffs of London (3 Wils. 309), in which Blackstone, J. says—"The jury have found the fact that the sheriff recognized the act of Bolland, but if they had not found that fact, I should have thought the sheriff was answerable in trespass for the act of his officer" (which was the seizing the goods of B. under an

execution against A.) "The law looking upon the sheriff and all his officers as one person, he is to look to his officers that they do their duty, for if they transgress, he is answerable to the party injured by such transgression; and his officers are answerable over to him. There is a difference between master and servant, but a sheriff and all his officers are considered in cases like this, as one person."

Now the whole question lies in this: are we justified in holding that, "not merely in cases like that," which are Mr. Justice Blackstone's words, but as to all contracts, however unauthorized and unusual, and even unheard of, which the subordinate officer may choose to enter into, in connection with or on the occasion of his executing some act of the sheriff's duty, "the sheriff and all his officers are to be considered as one person." The principle, if it be right to apply it to contracts entered into, as well as acts done, must be carried through, and the sheriff would be bound by the special covenants and engagements of the officer employed by the under-sheriff, as well as by those of the under-sheriff himself.

It seems to me that there is a substantial and plain difference between causes of action for torts committed in the execution of the process; that is, doing acts which the sheriff is bound to see done, and which he must therefore take care to have rightly done-and causes of action upon alleged contracts, which no one has a right to expect a sheriff or any of his officers to enter into; and which the person accepting the promise, may therefore reasonably be supposed to have looked upon as binding only on the individual who made it, and not on the sheriff, unless where it is shewn that the sheriff did, in that particular instance, give a special authority to his officer to do what the sheriff is never expected or accustomed to do, and what forms no part of his official duty. In Crowder v. Long (8B. & C. 605), Littledale, J., says-"the rule is, that the act of the officer, in execution of the authority received from the sheriff, is the act of the sheriff." In other words he represents the sheriff while he is doing or must be supposed to be doing something which it belongs to the sheriff's officer to do.

Now there may be contracts, both express and implied, on

which the sheriff may become liable, when they are engagements ordinarily entered into in the course of forwarding some act of official duty. For instance, it is not necessary to hold that the deputy sheriff may not bind the sheriff to pay various charges attending the execution of office business, as advertisements, taking care of goods seized, transporting prisoners, &c., though cases even of that kind may depend on their own circumstances, but ordinarily the sheriff sells only such interest in property as the debtor has; he is never supposed to be doing more—nor has any one any warrant by law, for imagining that the sheriff, or public officer, is to mix himself up with the interests and transactions of parties, and offer his personal guarantee that any particular state of facts exists. It is well understood that he and the parties act at their own peril.

He may agree to warrant the goods he is selling in regard to the property in them, or their quantity or quality; and if he does, it will form a collateral undertaking, distinct from his official duty, and in opposition to the usual course of proceeding. No officer deputed to act for him has, in my opinion, a discretion to bind him without his knowledge, by any undertaking of the kind. His authority to make a contract for him may, as in other cases, be assumed from circumstances—the sheriff may be made liable by previous direction or subsequent adoption of the act; but unless something of this kind is shewn, I do not see that we can hold the sheriff liable, because I do not think the under-sheriff, or any other officer entrusted by him to execute process, represents him for any such purpose.

My difficulty in coming to any other conclusion is, that although as regards wrongs committed under color of executing process or in the course of executing it, the officer represents the sheriff, who must answer as the courts say, for his transgressions, yet as there is no necessity, so I think there is no authority, for extending that principle to special contracts or engagements, wholly beside the sheriff's proper line of duty; and by which, therefore, the officer entering into them, can have no presumed right to pledge the sheriff, though he may pledge himself. As to any contracts of that

unusual kind, the deputy sheriff, I think, stands on no other footing than other general agents, as Lord Denman ruled in Snowball v. Goodrich, he must to some purposes be regarded.

Now, as to general agents making contracts which shall bind their principal, Mr. Chitty, in his work on Contracts, 1st ed. page 61, gives this statement of the law, which I take to be correct: "Whether the servant be invested with a general or a special authority, the master is not bound if the servant's actor contract do not fall within the general purview or scope of his powers, or be wholly unconnected with the business entrusted to his direction. * * In such case the master, never having authorized the servant to transact such business for him, does not enable the servant to delude the public. * * Servants in a particular business are incidentally and tacitly allowed to bind their master by such subordinate acts as are necessary, or are usually done, to carry into effect the principal act to be performed for the master; unless such presumptive power be expressly withheld by the latter. * * The usage of trade and mode of transacting business in that department in which an agent is employed to act, will, in the absence of express directions, frequently determine a doubt as to the liability of the latter."

If the sheriff had been selling these goods as his own and on his own account, through an agent generally employed by him for such a purpose, then the law as laid down by Mr. Justice Ashurst, in 3 T. R. 760, would have applied, because in such a case, it would have been acting in accordance with what is very common in such cases, that the vendor should through his agent have warranted the property that he was selling to be his own. The fact would have been within his knowledge, the price given would be coming to himself, and he would be interested in removing all doubts upon the subject.

I cannot think that, as between the sheriff and his deputy, there can be an implied authority to make contracts in the course of business belonging to the office, but contracts not necessarily or usually made in transacting such business, any more than is admitted to exist as between partners; and the late case of Brettel et al. v. Williams et al. (4 Ex. 623), is a strong authority to shew that the law does not hold one

partner liable on a guarantee given by theother in the course of transacting the partnership business, unless it can be shewn that the guarantee was necessary to be given for carrying into effect the partnership contract, or that the other partner had adopted it. There the guarantee was clearly given in good faith, for a purpose strictly connected with the partnership business; and it would seem not only reasonable, but for the evident interest of all, that it should be given. said the only question was, whether the partner had the authority to bind the others in that case by the guarantee, "in consequence of its being a reasonable mode of carrying into effect an acknowledged partnership contract. We think that position cannot be maintained. One partner does communicate to the other, simply by the creation of that relation and as incident thereto, all the authority necessary to carry on the partnership in its ordinary course, and all such authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger."

In reason, I think, the same may be said of an attempt to hold a sheriff liable in a guarantee given without his authority or knowledge, by his deputy, who, though his deputy for executing writs, is not his deputy for any such purpose. I think the reason against admitting the liability in the sheriff's case, is much stronger than in the case of the partner. If we should hold the sheriff liable here, it must be because his deputy having the writ to execute, could bind him by anything he chose to do, or say, or stipulate on that occasion; it could not merely be on the ground of the sheriff having taken an indemnity, for that would supply no legal principle on which the under sheriff could be allowed, of his own head, to place the sheriff in a different situation merely because he knew that fact. And on the same principle on which we should hold the sheriff liable on the warranty of title, we should have to hold him liable if the deputy had warranted the age or qualities of the horse he was selling, or his pedigree. And in selling leasehold premises under execution, the deputy might as well engage in the sheriff's name, not merely that the property belonged to the debtor, but that it was unincumbered, or that the lease would be renewed, or in fact anything that he might choose to think would make it sell better.

The case of Thomas v. Pearse (5 Price, 578), and of Underhill v. Wilson (6 Bing. 697), may appear to be inconsistent with the opinion I have expressed, and to give a strong support to this action against the sheriff. They seem to me however, to afford strong illustrations of the distinction which I think ought to prevail and does prevail, and which I have endeavoured to state plainly. Both of these cases proceeded upon the principle of the sheriff's adoption of an arrangement effected in his name, being the return which he had made in consequence of that arrangement. It is a clear principle that the sheriff cannot disclaim a return made by his deputy in his name. He is bound by it, as he is by the arrest or seizure of goods made under a writ by his deputy, whether rightful or wrongful, because both are ordinary official acts which he must either do himself, or abide by them, as they may be done by those whom he employs. And in both these cases the sheriff was held to have recognized and ratified, by the return which was necessarily treated as his, the arrangement on which that return was founded, and which, when thus adopted, threw upon him the responsibility of complying with such arrangement. It is quite common for the under-sheriff to make arrangements after he has seized goods, which dispense with the necessity of selling them. He may obtain from the party himself, or from some friend, a sum of money equivalent to the estimated value of the goods seized, on an understanding that the goods are to be restored, and when the sheriff's return carries such an arrangement into effect, the sheriff could hardly be allowed to receive and pay over the money, and yet refuse to give up the goods. What was done in the cases referred to, was nothing more or less than the under-sheriff's manner of enforcing the writ; instead of proceeding to a sale, he took his own course for making the money, which was the official act required of him.

On the whole, I still think this action does not lie, though I am by no means free from doubt. If it has been hitherto

understood that the sheriff could be made liable on a warranty of this kind, given by his deputy or officer, I cannot but think that we should have been able to find some trace of such an action. Then, 2ndly—It appears to me the sheriff would be placed in a most unfair position if he should be held bound by such engagements made by his officers—engagements not required for the discharging the duty committed to them, not contemplated by law, and most unusual, if not unheard of, in the transaction of the sheriff's business. 3rdly—I consider it more reasonable to hold that a purchaser at a sheriff's sale, when he asks for and receives a warranty of this kind, must know that he is requiring and receiving what it is no part of sheriff's duty to give him, and consequently should be looked upon as relying only on the promise of the party who gave him the assurance.

The case of Doe dem. James v. Brawn, reported in 5 B.& Al. 243, which I have before referred to, seems to me to be quite in accordance with the opinion which I have ventured to express in opposition to some of my learned brothers.

There, upon a sale of certain leasehold premises in execution, the under-sheriff made a conveyance to the purchaser in the name of the sheriff, and under the seal of office, as is often done in this country, I believe, though probably the general practice may be to have the sheriff himself execute the deed, It was objected at the trial that no evidence was given to shew that power was given to the under-sheriff in his appointment, to execute deeds in the name of the sheriff. But Lord Tenterden, who tried the cause, ruled that the under-sheriff's acting as such was sufficient proof primâ facie of his appointment, and that being so, he held further, "that it must be presumed that he had authority to execute all instruments necessary to be executed by the high sheriff." Afterwards the defendant's counsel moved in term, on leave reserved, for a nonsuit on the exception hehadtaken, butthe court thought the evidence was sufficient, "and that the under-sheriff had authority, virtute officii, to execute such instruments."

Now this puts the power of the under-sheriff to bind the sheriff precisely on the ground on which I think it rests,

namely, that he has authority to do all acts, make all contracts, and execute all instruments necessary to be made and done by the sheriff; but when he does acts, makes contracts, or execute instruments which are foreign to the office and duties of sheriff, he does not act virtute officii, and does not by such acts bind the sheriff, but binds only himself. And I think it is no more than a due measure of protection to the sheriff as a public officer, to hold all persons bound to notice that distinction, and to understand that in taking from his deputy, contracts or deeds in the name of the sheriff, of such a character as do not belong to the office of sheriff, they are to look to him personally for their fulfilment, and not to the sheriff.

As, for instance, if, in the case I have last referred to, the under-sheriff had, without the sheriff's authority or knowledge, covenanted in the assignment in the sheriff's name that all the rent had been paid on the lease, or that the landlord would renew, or that the lease was a valid lease, no action, in my opinion, could have been sustained against the sheriff on such covenants. The distinction is a very obvious and intelligible one, and is not opposed, in my judgment, to a single case or dictum to be found in any book of authority-not opposed to the case of Peto v. Blades, because there the sheriff's deputy knowingly sold goods which did not belong to the debtor, which is the same in principle as if, having a writ against A., he knowingly arrested B. under color of it. There he was executing what all the world had a right to look upon as a ministerial act necessary to be done by the sheriff, and he was doing it deceitfully and wrongfully. The sheriff was held liable for this tortious manner of executing a duty which he was bound either to do himself or to cause to be done in a legal or proper manner. There was no special contract entered into, and the action was not on any contract, but as for a deceit practised by the undersheriff while doing a necessary act in the name of the sheriff. Any purchasers attending at that sale had no right to expect that the under-sheriff would give any warranty of title which could give them a remedy against the sheriff, even though the goods were erroneously supposed to be the debtor's, but

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they had a right to expect that he would not pervert the execution of his office to a fraudulent purpose, by selling for the goods of the debtor, goods which he knew were not his. And the case of Thomas v. Pearse, cited from 5 Price, no more conflicts, I think, with the distinction which I take to prevail, for it turns, as I have already stated, on the principles of confirmation and estoppel. It would have been monstrous if the sheriff, after discharging the execution with Mr. Thomas's money, could have withheld from him the goods on account of which Thomas had advanced the money.

So that these not being, as I think, authorities for holding a sheriff bound by covenants or warranties entered into by his deputy in his name, but without his authority or knowledge; and being covenants and warranties which it is no part of the sheriff's duty to enter into, and finding no other authority to support an action against the sheriff on such an undertaking, I continue of the opinion that the sheriff is not liable, and if that be correct, then it was proper that the court should make the order which they did make for a new trial, and therefore that this appeal should be dismissed.

MACAULAY, C. J., C. P.—The general question of the respondent's responsibility in assumpsit, founded upon the warranty or guarantee by his deputy of the title of the debtor in a writ of *Fi. Fa.*, to goods seized and sold by such deputy, under such writ, suggests three points of consideration:—

1st. The liability of principals for the acts of their agents generally.

2nd. The responsibility of sheriffs for the acts of their subordinate officers generally.

3rd. Their liability for the acts of their deputies in particular, both in relation to matters of contract as well as of tort.

1st. Among other cases of agency and implied authority therefrom, may be mentioned—Godb. 361; 1 Roll. Abr. 95; 2 Rol. Rep. 269, 270; Nickson v. Brohan, 10 Mod. 109. A master commands his servant to sell his horse; the

servant sells him as a good one; no action against the master-Fenn v. Harrison (3 T. R. 757, 761). Defendant's counsel having cited the above, Lord Kenyon said he very much doubted the case alluded to, of the servant warranting the horse against the directions of his master; to such a case, he said, "I think the maxim of respondent superior applies, and the principal has his remedy against his agent for his misconduct;" Ashurst, J., said, he took the distinction to be, that if a person keeping livery stables and having a horse to sell directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.

Helyear v. Hawk (5 Esp. 72.)—Defendant's groom sold a horse by private sale that had been sent to Tattersall's for sale, and the purchaser having brought an action against the vendor, on an alleged warranty of the servant, that the horse was seven years old and free from vice, Lord Ellenborough said—"I think, the master having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing he binds his master."

Alexander v. Gibson (2 Camp. 555.)—Lord Ellenborough: "If the servant was authorized to sell the horse, and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness, it being usual to give a warranty, and fairly to be presumed within the scope of his authority.

Pickering v. Busk (15 East, 45)—Bayley, J.: "If the servant of a horsedealer, with express directions not to

warrant, do warrant, the master is bound; because the servant having a general authority to sell, is in a condition to warrant," &c.

2nd. The responsibility of the sheriff civiliter for the acts of his bailiffs, whether deputies or others, is well settled—Latch, 187, Laicock's case; R. v. Huggins, (2 Str. 885); Brown v. Copley (8 Scott, N. R. 362).—Tindal, C. J.: "The ground of the sheriff's liability for the acts of his bailiff is, that he is casting upon another the duty which the law imposes upon him, and consequently that he is acting by a servant."

Smart v. Hutton (2 N. & M. 426).—Parke, J.: If the sheriff puts into the hand of his officer a writ, he and his officer are to be considered as one person for everything the officer does under color of that writ."

3rd. The power to appoint, and the authority of deputies will be found explained in 16 Vin. Ab., Officer K. & K. 3; Com. Dig. Officer D. & D. 3; Bac. Ab. Sheriff, H-which, among other cases, refers to Norton v. Simmes (Hob. 13, that an under-sheriff is, in effect, the sheriff's deputy, and as such renewable at pleasure; that in making an undersheriff, the sheriff did implicitly give him power to execute all the ordinary offices of the sheriff himself that might be transferred by the law, as services of process and executions, and the like; that he cannot limit his authority even by express covenant, as that he should not serve executions above £20 without a special warrant, which would be to deny or delay justice, or a covenant against law; that though he may choose not to make an under-sheriff, yet he cannot make one and abridge his powers, no more than the king may in the case of the sheriff himself.

Parker v. Kett (1 Salk. 96).—Holt, C. J.: That any deputy, when a deputy may be appointed, had full power to do any act or thing which the principal might have done; that a deputy cannot be to do a single act or thing, nor have less power than his principle—Latch. 187, Laicock's case, Dyer, 238 (b) Pl. 38.

Lane v. Cotton (1 Salk. 18, No. 4, 5).—Holt, C. J.:

"What is done by the deputy is done by the principal, and it is the act of the principal, who may displace him at pleasure. That acts of a deputy, which, if done by the principal would be a forfeiture, the deputy shall thereby forfeit the office for his principal.

Drake v. Sykes (7 T. R. 113)—The under-sheriff is the general deputy of the high sheriff for all purposes—is the

general officer of the sheriff.

Cameron et al. v. Reynolds (Cowp. 493).—All actions for breach of duty must be brought against the high sheriff, though by default of the under-sheriff or bailiff.

Scarfe v. Halifax (7 M. & W. 288).—Parke, B.: The undersheriff represented the sheriff for all purposes relative to the execution of the writ, and the sheriff was responsible for him, whether he disobeyed his instructions or not.

Toplis v. Grane (5 Bing. N. C. 636).—Defendant, attorney of O, authorized plaintiffs, as brokers, to distrain the goodson A.'s premises for rent due to O.—Some being claimed as privileged, plaintiffs required an indemnity, which the defendant gave on the part of O. The owners having recovered against plaintiffs, defendant was held liable to make good the loss they had sustained. This case is material in the question of costs.

Thomas v. Pearse, Sheriff of Essex (5 Price, 578).-In February, 1816, defendant, the sheriff, under an extent against Hulbert, seized certain malt and other effects to the value of £1000. In March following he also seized the same effects. being ostensibly Hulbert's, under a Fi. Fa., at plaintiff's suit against said Hulbert for £600. Plaintiff entered into an arrangement with the town agent of the under-sheriff on the 18th of March, by which he was to have possession of the malt on paying him the amount to be levied under the extent (£562), which he did pay, and obtained an order from the undersheriff's agent to the bailiff in possession, to deliver the malt to the plaintiff; while in the act of delivery, Blyth, the landlord of the premises, claimed the goods, denying Hulbert's right of property therein, but being disregarded by the bailiff, he rescued the goods, and plaintiff never received actual possession or delivery. In an action of assumpsit

against the sheriff, founded on the contract to deliver the malt, &c., he was held liable.

Richards, C. B., said, "The action is certainly bottomed on a contract, and the main question is, whether the sheriff is bound. Now the sheriff left the affair to the discretion of the town agent, who was certainly as much the agent of the sheriff as the under-sheriff was; and it would be a deplorable doctrine in its general consequences if he were not, for thus a sheriff might easily rid himself of all responsibility by requiring his deputy to appoint in all cases a sub-agent for the purpose of discharging himself." After observing that it was a case of an extraordinary nature, of which heremembered no precedent, he went on to say, "We must therefore be governed by principle." "How far the town agent of the sheriff was justified in so contracting with the plaintiff, is another matter. He did in fact contract, and he received the money agreed to be paid to him by the plaintiff; and it would be too much to say that he was entitled to put it into his own pocket, without performing the consideration on the faith of which it had been paid to him. He certainly contracted to deliver the malt, and he as certainly did not do so. Then the question is, whether the agent of the under-sheriff, the person who actually made the contract, was such a representative of the sheriff as that his acts bound him. I am of opinion that it cannot be contended. even in argument, that the sheriff would not be liable for the official acts of such a person. Whether the sheriff had any rightto make such a contract, and part with the goods, I do not decide. His having engaged to do so, is sufficient to sustain this action. Then the case stands thus-the plaintiffengaged with the sheriff's agent to pay so much money, in consideration of his doing that which he has not done; and the agent by that contract bound the defendant, who may have his remedy over, and I cannot help stating that the sheriff has, in that one respect, the advantage of the plaintiff. by his return of the writ of extent, that the debt had been satisfied, he adopts and acknowledges the act of the undersheriff's agent, and that although he did not know so much of the matter as we do now."

Graham, B.—"The first question is, whether the act of the

under-sheriff's agent is the act of the sheriff, and I think it clearly within the rule, qui facit per alium facit per se; and if such agent should mistake his course, the sheriff is responsible, for he is also benefitted by the acts of the same person." Again, "The agent takes upon himself so to act, and he is clearly identified with the sheriff, who is responsible, and should be indemnified, as he most usually is.

Wood, B.—It is admitted, that if the defendant had made the contract he would have been bound by it; then the first point is, whether the under-sheriff is answerable for his agent, and the sheriff for both; and I am of opinion that he is, for the acts of the latter are the acts of the former, and each has his remedy over against the other."

Garrow, B.—"The mischief, as my Lord Chief Baron has well observed, would be enormous, if responsibilities were thus allowed to be shifted;" and having remarked upon the relative situation of all the parties, and the notoriety of there being an acknowledged permanent agent in London for the County of Essex, as there was also of Middlesex, his Lordship said he considered this case completely within that of Woodgrate v. Knatchbull (2 T. R. 148), and that the sheriff was fixed by the act of the sub-agent.

The foregoing authorities shew how amply the sheriff is identified with his deputy, not merely for torts, but for contracts made officially, in the discharge of the duties of the office which devolve upon, and are entrusted to such deputy.

In relation to the debtor's right to goods seized and sold by the deputy, under writs of Fi. Fa., there is no room to infer an implicit warranty of good title. The purchaser knows the deputy is not only executing a delegated authority, but that he is not professing to sell the goods as belonging to his principal; on the contrary, that he is only exercising a power conferred by law, to sell the goods of a stranger, that is, of the debtor named in the writ; wherefore the maxim of caveat emptor may well apply—13 Jur. 282; 3 Ex. 500; 14 Jur. 652. Seeing, however, that a sheriff so selling, does impliedly undertake that he is not aware that he has no right to sell the goods, as belonging to such debtor—in other words, that he is acting bona fide; and seeing that when his deputy

acting bona fide nevertheless acts illegally, he is responsible for his acts in actions on the case founded in tort, and even to the extent of forfeiture of his office, I see no authority or reason against the legal inference, that for express undertakings for the title in goods sold officially, and bona fide made by his deputy to induce purchasers to bid, and of which he (the sheriff) derives the benefit, he is bound and responsible in an action on the case founded on the contract, or assumpsit—3 Q. B. 511; 15 Jur. 15: 20 L. J. C. P. 7.

In relation to third persons, the law evidently regards the sheriff and his deputy as one or identical, and the public or individuals may place faith and confidence in what the deputy says and does in the course of his business and duties as such deputy, in the execution of process mesne or final, as authorized by his position, and of equivalent force as respects the liability of the high sheriff as if he had personally said and done the same thing; and, as observed by the learned chief baron and barons in the last mentioned case (5 Price, 578), it would be a deplorable doctrine in its general consequences if it were not so. I must also say, it would be deplorable in the present case, if the defendant's deputy, having invited the plaintiff's confidence as a bidder upon the promise of guaranteeing the title, such promise being made officially and publicly in the course of selling goods seized under a Fi. Fa., and having thus induced him to become a purchaser and pay the price, the plaintiff after being put to large costs and expense in defending the purchase so made, is to be told that the defendant is not responsible for the undertaking of his deputy so given. I lay no particular stress upon the defendant's deputy being induced to offer the guarantee by reason of the defendant's being himself indemnified in selling the goods, though it is a circumstance not to be overlooked; nor upon the facts of the defendant having received the benefit of the sale—that is, the money paid by the plaintiff—though not immaterial; for I consider that were these circumstances wanting, he would still be liable upon general principles of law, as respects the liability of sheriffs to answer for the acts and conduct of their deputies, in the course of executing writs of Fi. Fa., entrusted to them to be executed.

Of course the case is strengthed by the facts—1st. That the defendant was himself indemnified; one object of which indemnity must have been to encourage the defendant to go on and sell, notwithstanding the disputed claim to the property; and to carry out which object effectually, it might become (as it really did) essential to its attainment that the buyers should be indemnified as well as the seller. The defendant (the seller) being indemnified by the execution creditor, it was only carrying out in its full spirit the motive and object with which indemnity to him was given, that the defendant should in his turn, undertake to indemnify the purchaser, to prevent the sale being abortive and the execution creditor left to all the responsibility of answering for the full value of the goods, without the benefit of a fair price being obtained therefor at public vendue.

2nd. That the defendant received and has received the benefit and proceeds of the sale, although when he received the amount, he may not have known so much of the matter as we do now—See Thomas v. Pearse (5 Price, 578), Richards, C. B.

Subsequent investigation has only tended to strengthen the opinion I expressed at Nisi Prius, and which was in accordance with the impression I always entertained relative to the responsibilities of sheriffs for the acts of their deputies.

It is not necessary to speculate upon the possible results to which my views might lead. I do not, therefore, determine whether the sheriff would be equally liable upon the warranty of his deputy respecting the age or soundness of a horse, the description or quality of goods, or other collateral or latent matters. As to some, the buyer might be as well able to judge upon inspection as the seller, and as to others, whenever such a warranty takes place, preceded by an indemnity from the execution creditor to the sheriff, with a view to his protection in the premises, or even spontaneously given by the deputy in order to enhance the sale, it will be time enough to consider the effect. My opinion is at present limited strictly to deputy sheriffs, as distinguished from mere bailiffs, and to warranties of title given by them in order to inspire confidence in bidders, and to induce them to purchase

goods offered at sheriff's sale but adversely claimed to be owned by another.

The title, when disputed, cannot be investigated on the spot by persons casually present. Prima facie, the maxim of caveat emptor applies to such sales; but (whether the sheriff be indemnified or not) if the deputy expressly exonerates the bystanders from the application of this maxim, and encourages them to confidence in the title by his assurances of indemnity, and guarantees a valid title to those who might become purchasers, the maxim would be, for that occasion, superseded, and they would buy not at their own risk, but upon the responsibility of the vendor. The common law rule, otherwise applicable to vendees, would be modified by an express warranty of title in the special instance, and when given by a deputy sheriff in the course of an official sale, I cannot but think the undertaking binds the principal sheriff as a contract. If it did not, then I apprehend that to abuse his authority, and induce strangers to become purchasers under void assurances of that kind, would be such a dereliction in the deputy as to constitute a tort or transgression, as expressed by Sir William Blackstone, in 3 Wil. 317, for which the sheriff would be liable in an action on the case, as for the wrongful act of his deputy in the execution of the writ and the conduct of the sale—1 H. B. 241, 3 B. & C. 357, 5 D. & R. 224; and if so, it would, in effect, amount to the same thing as respected his liability to the party aggrieved.

Regarded as a tort, the sheriff would be liable, though he repudiated the transaction, quite as much as he would be bound by a contract under like circumstances. When however a transaction (as in the present case) is adopted, of course additional weight is given to the argument in either point of view.

I do not consider it a sufficient answer, that the purchaser has a remedy against the deputy as a principal, by reason of his having exceeded his authority, however the buyer might be entitled to recourse against him in some shape or other if the sheriff was not bound or liable to him.

The effect of holding the deputy liable upon a warranty would be to combine the contracts of two separate parties in

the one transaction of sale. First, a contract of sale by the sheriff, through his deputy, to transfer the right of property under the writs; for the deputy, except so far as deputed, would have no power to sell or dispose thereof: and secondly, an agreement by the deputy, personally, to warrant the title, superadded. In which event the consideration for the warranty would be, not the purchase of the goods by the vendee from the deputy, but from the principal sheriff, without any possible advantage to such deputy; and although upon their sale by the principal sheriff through his deputy, under the execution, as the goods of the debtor, the sheriff, by seizing and selling, would ostensibly and impliedly hold them out to be the goods of such debtor, and disposed of as belonging to him accordingly. Unless the deputy (a known agent of a known principal) expressly undertakes personally, or at all events unless he undertakes separately, for the validity of the title, as distinguished from the sale of the goods, or incurs a personal liability upon an implied promise that he had authority from his principal to warrant such title, I find no authority for holding him personally responsible for such an act, done bond fide in the course of, and with a view to the more efficient performance of the duty intrusted to him by and on behalf of the principal sheriff.-Paley on Prin. and Ag. 368-378, 385-386; 3 T. R. 761; 6 C. & P. 506.

If there was any contract of warranty, I think it must have been by the defendant, through his deputy; if not, I do not see how, on this warranty, the deputy can be held to have contracted personally, however he may be exposed to some other recourse or responsibility at the suit of the plaintiff, if he is without remedy against the respondent.

Upon the reärgument of this case, it was contended by J. H. Cameron, Q. C., for the defendant, that the evidence did not support the declaration.

It was objected to by Mr. John Duggan, for the plaintiff, that no such point can be raised on this argument.

In my construction of the new rules of this court, I think the grounds of appeal should be specifically assigned, and that, upon the principle of the practice in Error in England, the points intended to be relied upon by either party, especially if new, should at least be stated in the margin of the appeal book.

But this court has hitherto permitted the appellant to raise objections for the first time at the argument, such objections not appearing in the grounds of appeal assigned as error, even in the margin of the appeal book; and upon the same principle a respondent must be admitted to sustain the judgment or order, upon any grounds that he can urge, without giving previous notice thereof. The objection was therefore heard; but, for my own part, considering that this is a reärgument of the case, directed by the court, I do not think that, in strictness, the respondent's counsel is entitled to introduce new points. However, I expressed my opinion at Nisi Prius, that there was evidence to go to the jury sufficient to support the declaration, and I perceive no good reason for relinquishing that opinion.

The first count states that in consideration that the appellant would buy of the respondent, as sheriff, &c., a certain horse, &c., he promised that Keating, senior, then was the true owner thereof; and that the respondent, as such sheriff, had good right to sell the same, &c., and would save harmless and indemnify the appellant as purchaser thereof; and assigns for breach, that said Keating was not the true owner, and respondent had not good right, &c., to sell the same, &c.

The second count states that in consideration that the appellant would buy a certain horse, &c., respondent undertook and promised that he had lawful right and title to sell the same, &c.

The evidence of such promise was, that the respondents—who as such sold the horse—stated to the audience, including the appellant, that whoever bought should be indemnified in the peaceable and absolute possession of the property, and from all loss for ever; that those present refused to buy unless he would guarantee; and that he said what he did to nullify the notices of an adverse claimant, and whose claim deterred bidders, and that he considered it his duty to do so: that he intimated his right and power to sell as deputy sheriff under the execution, and meant to guarantee the purchaser officially; after which the appellant purchased the horse and paid the price.

Now, what did the deputy-sheriff guarantee but a good title to the property, which was in effect guaranteeing or promising that it was the property of Keating, senior, without which the deputy could not, as he alleged, have the right and power to sell it; and when it is borne in mind that these assurances were made in consequence of the respondent being indemnified by an execution creditor, and in order to counteract the opposing claim of Keating, junior, which had deterred the bystanders from bidding, I see no room for treating it as otherwise than sufficient to support the promises as laid in the declaration. The very object of his assurances was to encourage bidders, not only by alleging a right and power to sell as being Keating senior's, notwithstanding the counter claim set up by his son, but by guaranteeing or warranting the title to any who might purchase and pay the price.

Upon the liability of the respondent to answer for the undertaking of his deputy under the circumstances of the case as in evidence, I see no reason for changing the opinion I had previously entertained, and therefore adhere to it.

McLean, J .- The plaintiff in his declaration alleges that the defendant as sheriff had in his possession a horse, which he had seized under a writ of fi. fa., against the goods of one William Keating, the elder, and one George M. Chumasero; and that thereupon the horse being duly exposed to sale on the 31st October, 1849, in consideration that plaintiff would buy of the defendant as such sheriff, the said horse for £30, then offered therefor, the defendant undertook and promised the plaintiffs that the said William Keating the elder then was the true and lawful owner of the said horse, and that he, defendant, then had good right and lawful power as such sheriff, under the said writ, to sell and dispose of the said horse as the property of William Keating; and further, that he the defendant would save harmless and indemnify the plaintiff on account of his purchasing the said horse. Plaintiff then averred that he, confiding in the said promises, bought the said horse, and paid the defendant therefor; that the horse was not the property of Keating, and that the defendant, as sheriff, had no right to sell him;

that one William Keating the younger demanded the horse, and sued plaintiff in the county court, and that plaintiff, by reason of a judgment in that court, was obliged to pay to Wm. Keating, junior, a large sum of money—to wit, £50—for his horse, and a further sum of £20 for costs in that action, and was put to £10 further costs in defending the suit.

The declaration contained a second count, as upon a sale and warranty by defendant in his private capacity, saying nothing of his office as sheriff. And it also contained common counts.

At the trial, before Macaulay, C. J., C. P., the defendant contended that the warranty proved to have been given, was by Robert Beard, who acted as deputy-sheriff at the sale of the horse, and that defendant was not bound by that warranty, as the deputy had no authority to give it: various other objections were also urged, which at the time were overruled, and a verdict was found for plaintiff for £40 12s. damages.

In Hilary Term, 15th Vic., a motion was made for a new trial, on the ground that the warranty by the deputy-sheriff was unauthorized and not binding on the defendant, and the court granted a new trial on that ground.

Against that decision the plaintiff now appeals.

This is an action upon an alleged contract entered into by the defendant with the plaintiff for the sale of a horse, and upon the trial it appeared that the contract with which the plaintiff seeks to charge the defendant, was not entered into by the defendant, but by his deputy acting as sheriff; and the only question in this case appears to be whether the defendant, as sheriff, is liable on the contract entered into by his deputy. The sheriff is by law entitled to appoint a deputy to discharge the duties devolving upon him in his official character, and of course he may give to such deputy, power to bind him as his agent in any contract; but if the authority is only to discharge the duties belonging to the office of sheriff, he can only be held responsible for acts or matters done in the strict discharge of these duties. In this case the deputy was in the ordinary discharge of the sheriff's duty

when he sold the horse to the plaintiff, which forms the subject of this action: but it was no part of the sheriff's duty to warrant any property sold to be the property of the execution debtor. If the sheriff, under an execution, sells property, believing it to be the property of a party against whom he has an execution, he will not be responsible to a purchaser, though it should afterwards turn out that the property belonged to some one else, unless some express warranty has been given or some deceit practised. A sheriff does not, in selling, lead any purchaser to believe that he has any personal interest in the property or in the sale. He sells in a public character, in obedience to a writ issuing out of some court, and any purchaser must judge for himself as to the ownership of the property. He may refrain from bidding, or he may require a warranty to induce him to bid. If a warranty is given, the remedy of the purchaser must be against the party giving it. If an officer, under a special warrant, give such warranty, he alone would be responsible; and if the deputy, acting under a general authority from the sheriff, takes it upon himself, out of the ordinary course of the sheriff's duty, to give such warranty, he may be held accountable; inasmuch as his giving such warranty could not come within the scope of his authority as deputy sheriff, the recourse of the purchaser must be against him. It appears to me that a person acting under a special warrant, in carrying out the sheriff's duty under any one execution, would have precisely the same right to bind the sheriff in any warranty which he might choose to give in reference to property offered for sale under such execution, as the deputy sheriff would have, though acting under an authority which enables him to act in all matters connected with the sheriff's duty.

If a deputy has power to bind the sheriff by any parol contract in reference to personal property, what is to prevent his entering into a similar contract in writing, in relation to real estate. Could the sheriff be held responsible on any written guarantee of his deputy as to the title of real property? It is clear to me that he could not: such a guarantee would be wholly out of the duty belonging to his office.

Tomlinson v. Wheeler—(Vermont)—1 Aik, 194. Held—
"The liabilities of a sheriff for his deputy are those which the law imposes, and are for the neglect of duties which the law requires to be done. The deputy cannot make a promise to bind the sheriff—unless it be to pay over moneys collected on execution, and in that case an action for a tortious neglect may as well be brought."

Again, as has just been suggested by the Chief Justice, if a register of a county appoints a deputy, which he may do by law, he is answerable for the proper discharge of the duties by the deputy, and may be held responsible if any injury arises from his neglect or misfeasance in those duties. If a deputy were to certify property unencumbered in the regular discharge of his duty, and it afterwards turned out that such property was deeply encumbered, and an injury arose to a purchaser interested in the inquiry, the principal would be accountable for the acts of his deputy, or his neglect. But if the deputy discovered the encumbrance and pointed it out to the party searching the records; and then for certain consideration undertook to defend the party against such encumbrance, and entered into an agreement by which he stipulated that that encumbrance had been paid off or discharged -surely for such an undertaking-wholly beyond the limits of his duty-the principal could not be held responsible in an action, as for something done by himself. On these grounds I fully concur in the judgment as delivered by the Chief Justice, and think, with him, that this appeal should be dismissed.

ESTEN, V. C —This was an action upon a warranty of title to a horse, given by the under-sheriff upon a sale of the horse under a writ of *Fieri Facias*, and the sole question proposed for our consideration was, whether this warranty was binding on the sheriff, the under-sheriff having no other authority to give it than what was implied in his appointment to the office of under-sheriff.

Several cases were cited in the course of the argument, at all of which I have looked, and at others also.

It is quite clear that the under sheriff represents the sheriff

in his official capacity to as great an extent as it is possible for an agent to represent his principal. The sheriff is liable for the misconduct of the under-sheriff in the execution of his office, and for any abuse of his authority; he is bound by his declarations, statements and admissions, made in the discharge of his functions, and by any agreement or arrangement that he may make within the line of his official duty.

These propositions are established by the cases which were cited, and are perfectly intelligible. The sheriff, not choosing to execute the duties of his office himself, but intrusting its execution to another, must be responsible for the manner in which he executes it, however illegal, and for any abuse of the authority which he, for his own convenience, has committed to him. This doctrine has been carrried so far that the sheriff has been deemed liable for anything done by the under-sheriff or other officer under color of his authority,—as, where the sheriff's bailiff arrested a man under a writ of Fieri Facias. However strong this decision may be, its reasonableness is obvious; because the sheriff, by arming his officer with his authority, enabled him to commit the act which was complained of as an abuse of it.

Again: the sheriff is bound by the admissions, statements and declarations, made by the under-sheriff in the discharge of his functions. It is obvious that when the sheriff puts another person in his place for the purpose of executing his duties, it will be necessary for that person to be in constant communication with the public, and to make statements and declarations continually in the course of his official proceedings; and as the occasions on which it will become necessary to act in this manner are of infinite variety, and cannot possibly be forseen, his authority for this purpose must be nearly unlimited.

The declaration must accompany some official act, and in fact be parcel of it; but with this qualification, the sheriff is bound by every declaration or admission of his under-sheriff made in the exercise of his functions.

The question, however, which we have to decide is, whether it is necessary to the execution of the sheriff's office that the

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under-sheriff should have power to enter into any engagement which may facilitate the discharge of the sheriff's functions, of whatever nature it may be, and however much it may be beyond what the law requires of the sheriff as part of his duty.

After the best consideration which I have been able to give to this subject, I think it would be unreasonable to invest the under-sheriff with such an authority. The law imposes certain requirements on the sheriff, which he cannot omit without being guilty of a dereliction of duty, and it appears to me that it is reasonable to hold that the appointment of an under-sheriff gives him positive authority to do every act which may become necessary to the execution of the sheriff's office, but nothing more. Engagements and undertakings which may be very useful in removing obstacles in the way of sales, and into which the sheriff himself may properly enter, and by which, if he enter into them, he will be bound, I do not think that the under-sheriff derives any authority to make, from his mere appointment to that office. The sheriff himself, in entering into such engagements, must be considered as acting in his private and not in his official capacity; for instance, the warranty in the present case may have been given by any third person who may have been present at the sale, and who might have been interested in promoting it. The principle which has actuated courts of justice in giving such powerful effect to the acts of sheriff's officers, has been tenderness towards the public, dealing with a person whom the sheriff has put in his place, and armed with authority, who is known to the sheriff, and from whom he has, in all probability, obtained an indemnity: but does this principle apply to a case like the present?

When the public see a person officiating as under-sheriff, they may fairly conclude that he has received an appointment to that office, but they have no right to suppose that anything more has passed between him and the sheriff; and the reasonable inference which they should draw from that fact is, I think, that he has authority to perform every act necessary to, or which may enter into the due execution of the sheriff's office. Now the sheriff's duty upon the sale of chattels under

an execution is not uncertain; it is clearly defined by the law, and is known to every one, for every one is deemed to know the law. It is no part of the sheriff's duty to warrant the title to the goods sold; he only warrants that he does not know that the defendant has no title to them.

No doubt the under-sheriff has a discretion in the exercise of the functions intrusted to him, and is not tied down in all cases to pursue one invariable course in the discharge of those functions. The question will always be, in cases like the present, whether the act of the under-sheriff can be reasonably referred to the execution of the sheriff's office, and if so, it will be binding on the sheriff; but when the under-sheriff, proceeding in the ordinary course of a sale of chattels under an execution, outsteps the clear line of the sheriff's duty, and of the requirements of the law, known to everybody, I think it would be unreasonable, and wholly unnecessary for the due protection of the public, to hold the sheriff bound by such an act without the production of an express authority.

I do not know whether the opinion is anywhere entertained, that if the under-sheriff in the present case had warranted the horse sound in wind and limb, instead of warranting the title, the sheriff would have been liable. At all events, cases may be supposed in which the sheriff would not be considered by anybody, to be bound by an undertaking entered into of his under-sheriff upon a sale of goods under an execution, however conducive it may have been to the sale by inducing those present to purchase.

The authority of the under-sheriff is therefore not unlimited, and I know not where the line can be more justly and reasonably drawn than where I have endeavoured to point out.

For these reasons I do not think the sheriff was liable to this action, and therefore that the judgment of the court below, from which this appeal is brought, ought to be affirmed.

THE CHANCELLOR, DRAPER, J., and SULLIVAN, J., concurred in opinion with the Chief Justice of the Common Pleas, in favour of the appellant.

SPRAGGE, V. C., was in favour of dismissing the appeal.

The court being equally divided, no order could be made, but the respondent was not allowed his costs. (a)

REGINA V. FRANCIS.

Having connection with a woman under circumstances which induce her to believe that it is her husband, does not amount to a rape.

The prisoner was indicted before Mr. Justice Draper at the last assizes at Niagara, for an assault with intent to commit a rape upon a married woman.

It appeared in evidence that the prisoner had got into the woman's bed while she was asleep, as if he had been her husband, and without awaking her. As he was attempting to have connection with her she discovered him, and made her escape. The jury found that the prisoner intended to obtain possession of her person under the idea that it was her husband. The learned judge deferred sentence, and reserved the case for the opinion of this court, whether the circumstances proved would support the conviction.

DRAPER, J., delivered the judgment of the court.

There are many dicta of learned judges in various cases, from which a strong inference might be drawn that the case of Rexv. Jackson (R. & R. C. C. 487) was not considered as a satisfactory decision; and the reservation of several of the judges who decided that case—(there being four out of twelve altogether against the decision)—that if a similar case should occur they would advise the jury to find a special verdict, would intimate that they were not altogether satisfied. The language

⁽a) See Wood v. Finnis, 7 Ex. 363, decided since the above judgments were given. The digest of the case is as follows: "It is no part of the duty of the sheriff in executing a writ of Ca. Sa. to receive the amount of the debt and costs, in order to pay them over to the execution plaintiff. And therefore where the debtor makes a voluntary payment to the bailiff, of the debt and costs, to be paid over to the execution plaintiff, and the bailiff fails to do so, and in consequence thereof the debtor is a second time arrested under a fresh writ issued upon the same judgment, the sheriff is not liable as for a breach of duty in not paying over the money to the execution plaintiff. Semble, that in such case the debtor's remedy is by action against the bailiff for breach of contract."

of Alderson, B., during the argument of Reg. v. Case (Temp. & M. 318), and still more of Patterson, J., in passing sentence in Reg. v. Camplin (1 Car. & Kir. 746), point strongly to a contrary opinion, and increases rather than diminishes the doubt suggested respecting Rex. v. Jackson.

Lately, however, the question has again risen (Regina v. Clarke, 18 Jur. 1059). One Clarke, during the last summer, was tried in England before Mr. Justice Crowder for rape. It was proved that he had connection with a married woman, who yielded to him, supposing him to have been her husband. The jury found the prisoner guilty, and they also found that when he entered the bed of the prosecutrix he intended to have connexion with her fraudulently, but not by force, and if detected to desist. The learned judge reserved the question whether the prisoner was entitled on these facts and finding, to an acquittal. The Lord Chief Justice of the Common Pleas gave judgment that the conviction should be quashed, stating that the court would adhere to the decision in Rex. v. Jackson. No reasons for the judgment are reported, and the judgment as stated would appear to sustain the case referred to generally, and not resting on any distinction which might be drawn from the finding that the prisoner intended, if detected, to desist. It is possible that-reflecting on the often-stated proposition that the accusation of rape is one easily made, and even if in some respects hard to be proved, yet still harder to be defended and rebutted by the party accused, however innocent he may be-the court may have felt there was danger in implying force from fraud, and an absence of consent, when consent was in fact given, though obtained by deception; and that cases might arise, however extreme, when a detected adulteress, might, to save herself, accuse her paramour of a capital felony.

Whatever the reasons, however, we consider we ought to follow the judgment, and therefore that the conviction should be quashed and the prisoner discharged.

EASTER TERM, 19 VICTORIA.

Present.—The Hon. WILLIAM HENRY DRAPER, J.

"ROBERT EASTON BURNS, J. (a)

MAITLAND V. HARRIS.

Goods furnished for vessel—Evidence of ownership.

Assumpsit for goods furnished for a vessel. Defendant was called as a witness, and proved that he had subscribed £50 towards a line of freight vessels from Toronto to Quebec, that he never had anything to do with this boat or with plaintiff with respect to her, but being sued for and obliged to pay some demands on her account, he had assigned what interest he had. It appeared too, the vessel was registered.

Held, not sufficient evidence of ownership to charge defendant.

Assumpsit on the common counts. Pleas—non-assumpsit, payment, and set-off.

The case was tried in May last, at Toronto, before Macaulay, C. J. The action was brought by plaintiff for goods, &c., furnished for the propeller Adventure, commencing in April, 1849, and amounting, up to 11th of September, in that year, to £30 2s. 6d., and commencing again in April, 1850, up to 14th of September of that year amounting to £20 13s. During the latter year plaintiff gave credit for £30 12s. 11d., and brought this action for the balance.

Two questions arose at the trial: 1st, Whether the defendant was legally proved to be the owner, and if so whether he had not ceased to be owner by virtue of an assignment to his son; and 2ndly, whether the credits, though not arising until 1850, should be applied in reduction of the earlier items of plaintiff's demand; in which case he would have been paid all his claim during the time that plaintiff was a part owner. On the first point the plaintiff called defendant as a witness, and proved by his statement that he had subscribed £50 towards forming a line of vessels to carry freight from Toronto to Quebec, and had never received anything back, or had ever interfered with, or had any thing to do with this boat, or with the plaintiff with respect to her; but being sued

⁽a) The Chief Justice was absent in England during this term.

and made to pay some demands on her account, he assigned what interest he had.

Leave was reserved to move to enter a non-suit on this point, and plaintiff recovered a verdict for £20 2s. 7d.

Hagarty, Q. C., obtained a rule nisi to enter a non-suit pursuant to leave reserved, or for a new trial on the law and evidence, and for misdirection, and the admission of illegal evidence.

H. Eccles, shewed cause.

DRAPER, J., delivered the judgment of the court.

We think the rule to enter a non-suit should be made ab-There was no proof of any act done by the defendant which afforded evidence of his being an owner of this vessel. In the absence of such proof it became necessary to shew him to be owner by some proof of his title, and this the more, because the plaintiff's first witness stated at the outset that the propeller Adventure was a registered vessel. There was no proof of the original register of the vessel; no copy proved under the 22nd section of 8 Vic., ch. 5. A paper purporting to be a copy of an entry in the register book of the custom house in Toronto, marked a "true copy" by the collector of customs at that port, was offered in evidence, but there was no proof of it being a copy, as the 8th Victoria requires; and, admitting the certificate of the officer that it was a true copy, to be evidence of that fact, there was nothing to connect the defendant with it: so that the whole evidence to affect the defendant was his own statement that he had subscribed £50, and that not for this particular vessel; that he had never interfered, but that, having been sued and compelled to pay some debts incurred on account of the vessel, he had transferred whatever interest he had in her. For all that is proved, he never was a registered owner, and if he was, according to his evidence (and he was called for the plaintiff), he never assented to his name being registered as an owner, and then the cases of Tinkler v. Walpole (14 East, 226), Fraser v. Hopkins (2 Taunt. 5), and Cooper v. South (4 Taunt. 802), would strongly apply in his favor. The statement made by him, that he had assigned what interes the had, could not make him liable, without further proof that he had some interest to assign; though, if it had been legally proved that he had duly executed a transfer of some shares in this vessel, it would have been proof that, up to the date of that transfer, he owned so many shares; and then we must have considered whether the disregard by the jury of the direction to apply the credits to the earlier items of the account, entitled the defendant to a new trial. At present this is unnecessary, for the reasons given.

Rule absolute.

TORRANCE V. JARVIS.

Malicious arrest-Evidence to shew want of reasonable and probable cause.

In an action for malicious arrest on mesne process for £93, the plaintiff proved that before such arrest he had assigned all his effects, amounting to £30,000, in trust for his creditors generally, with a proviso that dividends should be made for all, but that the sums accruing to such as had not come into the assignment, should be paid to the plaintiff: that he was employed by the assignees at a salary in arranging the estate, and that defendant had knowledge of the assignment. He also proved his own general high character and standing, and that defendant had been cautioned by one witness against making the arrest. On cross-examination it appeared that plaintiff's family and connections resided out of Upper Canada: that his house had been advertised for sale a short time after the assignment; that his liabilities were about £40,000; and that the assignment had been made without previously calling a meeting of his creditors.

Held, that the plaintiff had shewn prima facie a want of reasonable and probable cause, and should have been allowed to go to the jury.

CASE for maliciously causing the plaintiff to be arrested and held to bail upon a writ of capias. The declaration averred that defendant "not then having any reasonable or probable cause for believing, and not then believing, that the plaintiff was immediately about to leave Upper Canada, with intent" to defraud defendant of a certain debt, wrongfully made affidavit that he, defendant, had good reason to believe, and verily did believe, &c., &c., and sued out a writ of capias, endorsed to take bail for £93 11s. 6d., on which plaintiff was arrested, &c. Plea, not guilty.

The case was tried in Toronto at the spring assizes, before Macaulay, C. J. The making of the affidavit by defendant, the issuing of the writ, and the arrest of plaintiff were

admitted, and that the arrest itself was not made in a harsh or improper manner. The plaintiff's counsel called witnesses, who proved that the defendant had carried on a very extensive business in the grocery line for four or five years in Toronto: thathe was embarrassed, and in failing circumstances in January last, or perhaps earlier, in consequence, as one witness expressed his opinion, of the stringency of the money market, and on the 28th of February last he assigned all his effects to trustees for the benefit of his creditors-his assets being estimated at £30,000, and his liabilities at £40,000. The assignment contained a provision that the dividends should be made for the benefit of all the plaintiff's creditors, whether they executed the assignment or not; but in the latter case the amount of them was to be paid to the plaintiff. His household furniture was not sold by the assignees; they took a chattel mortgage of it. The writ appeared to have been issued on the 24th of March last, at which time the plaintiff was employed by the assignees in realizing his assets and winding up his estate, at a salary of £300 per annum. The plaintiff's counsel gave evidence of the general high character and standing of plaintiff as a merchant, and also proved by one witness that when defendant spoke to him on the subject of arresting plaintiff, he was cautioned against taking such a step. On cross-examination, the defendant's counsel elicited that the plaintiff's family connexions lived chiefly in Montreal, and that he had one brother in New York: that the house plaintiff lived in was advertised to be sold a month or six weeks after the assignment: that it was known he was in failing circumstances in January, and that no meeting of his creditors was called prior to the assignment. It was stated by one of the assignees that the assignment was notified, and a circular sent to all the plaintiff's creditors, and that he had no doubt that defendant was notified, though he could not particularly recollect it. The plaintiff's counsel desired to ask each of his witnesses whether from his knowledge of the plaintiff, and from the plaintiff's previous conduct, he (the witness) thought the plaintiff a person likely to abscond for the purpose of defrauding his creditors. This was not permitted. The

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defendant's counsel objected that this evidence did not sufficiently establish a warrant of reasonable and probable cause. The learned Chief Justice held that the facts did not shew primâ facie a want of reasonable and probable cause for defendant's believing, &c., or repel his having any reason to believe, &c.; and he non-suited the plaintiff, with leave to move.

Galt moved accordingly, and obtained a rule nisi; also in the alternative, for a new trial for the improper exclusion of evidence.

Hagarty, Q. C., shewed cause.

DRAPER, J., delivered the judgment of the court.

It is incumbent on the plaintiff in such a case as the present, to give sufficient evidence that the defendant had not any reasonable or probable cause for believing that the plaintiff was about to leave the province with intent to defraud him. Whether the facts which he offers for the purpose are sufficient, assuming them not to be contested, or to be sufficiently proved, to establish the want of reasonable or probable cause, is a question exclusively for the decision of the judge,-Panton v. Williams (2.Q. B. 169). If the facts on which the plaintiff relies are clearly made out or uncontroverted, so as not to require the decision of the jury as to their existence, the judge decides at once; and where the plaintiff gives no proof of such facts, such decision may well be on motion for nonsuit. If the existence of such facts be a question, then the jury must decide upon it, and upon that finding the judge declares the law. In Heslop v. Chapman (18 Jur. 348), Jervis, C. J., says: "Some judges ask the jury several questions, and say-'if you answer these questions, I will then determine whether there is reasonable and probable But it is perhaps more technically correct to say, "I am of opinion there is reasonable and probable cause if you find so and so." Whichever course is taken, this conclusion is self-evident, that the judge is not himself to determine the fact upon which the existence or non-existence of probable cause, as a legal conclusion, is to be arrived at, if those facts are in dispute or doubt.

In the present case, it seems to me, the learned Chief Justice was warranted in taking all facts of which there was evidence and which bear upon the question of want of probable cause, as admitted. The plaintiff, at all events, has no ground to complain of such an assumption, and the defendant's counsel, in moving for a nonsuit, must be held to admit the existence of any such facts as are in evidence, denying only that they warrant the conclusion at law; or he must be taken to deny that there is proof of any fact, which will warrant an adverse legal decision.

If this be so, we must enquire what facts the learned Chief Justice had before him on which to pronounce his decision, whether a want of reasonable and probable cause was sufficiently shewn.

The following appears to me to have been relied upon for the plaintiff:—

1st, His conversation with Mr. Crowther before the assignment—i. e., before 28th February, 1855, in which he intimated his intention to arrest, and the caution given to him in reply.

2ndly, the assignment of all his effects in trust for all his creditors, pari passû.

3rdly, The large amount of assets assigned, said to be £30,000, and especially contrasted with the amount for which plaintiff was held to bail, £93 11s. 6d.

4thly, The proviso, that the dividends accruing on debts due to creditors who would not come in under the assignment, should be paid into the hands of the plaintiff himself.

5thly, The employment of the plaintiff, by the assignees, at a salary of £300 per annum, for the purpose of realizing his assets, and winding up his affairs, which would to all appearance require his remaining in Toronto, where his business had been carried on.

6thly, The defendant's knowledge of this assignment.

7thly, The general character and reputation of plaintiff, the questions as to which seem not to have been objected to.

The qualifying circumstances elicited in cross-examination being—1. The residence of plaintiff's family and connections out of Upper Canada. 2. The withholding his househeld

furniture from sale by his assignces, though I do not see what inference adverse to the plaintiff this gives rise to.

3. The advertising of plaintiff's residence for sale in a month or six weeks after the assignment.

4. The large amount of his liabilities, £40,000, the effect of which was again qualified by proof that the principal creditors, particularly those in Montreal, had come in under the assignment.

5. The making the assignment without previously calling a meeting of plaintiff's creditors.

In deciding this case we must bear in mind the terms of the affidavit made by defendant, "that he has good reason to believe and verily does believe that the (now plaintiff) is immediately about to leave Upper Canada, with intent and design to defraud (the now defendant) of his said debt." He affirms belief of two things, an intent immediately to leave Upper Canada, and intent to do so in order to defraud. A want of reasonable and probable cause for either would, I apprehend, entitle the plaintiff to go to the jury. As is said by Tindal, C. J., in Broad v. Ham, (5 Bing. N. C. 725): "There must be a reasonable cause, such as would operate on the mind of a discreet man: there must also be a probable cause, such as would operate on the mind of a reasonable man." Has the plaintiff shewn primâ facie-for that is enough to call on the defendant to shew the reason of his alleged belief-a want of such reasonable and probable cause?

With every respect for the opinion of the learned Chief Justice, we must say that we think he has. As to the leaving Upper Canada immediately, the plaintiff's employment by the assignees, and the two-fold interest he had in fulfilling it, are to my mind not conclusive, but at least primâ facie evidence against any such intention. It was apparently the only remunerative occupation he had, having just given up all his effects. He had a direct interest in attending to this, as a portion of the amount collected and realized would come into his own hands, and he could hardly fail to anticipate that by leaving Upper Canada to defraud those creditors who had not come in under the assignment, he would forfeit his present allowance, as well as prejudice his receipt of this portion of the proceeds of his estate.

And as to the intent to defraud, we think that is primâ facie repelled. The assignment of all his effects; the trust for all his creditors, none having a preference or priority over others; the large amount made over, and the comparatively trifling claim of the defendant against him, are, in my humble judgment, sufficient to call upon the defendant to shew what reason he had for believing to the contrary of the inference, to which these facts unanswered, appear to me to lead-viz., that the plaintiff had no fraudulent intention as regarded the present defendant, any more than as regarded the whole body of creditors for whose benefit the assignment was made.

In our opinion the evidence shewed a want of reasonable and probable cause, sufficient to call upon the defendant to disclose his grounds for making the affidavit, -sufficient, if the defendant gave no evidence, to entitle the plaintiff to succeed, so far as the want of reasonable and probable cause gave him a right to a verdict. We think, therefore, there should be a new trial without costs (a).

Rule absolute.

SNARR V. SMALL.

Payment made with knowledge of the facts-Not recoverable as money had and received.

Defendant sold to the plaintiff and M. some lumber, the quantity of which was estimated according to a measurement made by M. and defendant's son. Two notes were given for part of the purchase money, the first of which was paid by plaintiff and M., and the second by plaintiff after he and M. had dissolved partnership. It appeared that before this note was paid, and before the desolution, M. had gone over the measurement again with defendant's son, and found a deficiency amounting to £74; and the plaintiff sued defendant for this sum as money had and received.

Held, that he could not recover, for the payment was made after the deficiency was known to M. while the partnership continued, and therefore known to plaintiff.

Assumpsit for money had and received. Plea, nonassumpsit.

It appeared that the defendant sold to the plaintiff and one Manning a large quantity of lumber; that the defendant

⁽a) See Turner v. Ambler, 10 Q. B., 252; Mitchell v. Williams, 11 M. & W., 205; Haddrick v. Heslop, 12 Q. B., 267.

made out and delivered to Manning a bill of the quantity. and that he and Manning went over a portion of it, partly measuring, partly estimating the quantity in each pile; that a son of defendant's went over most of the residue with Manning in a similar way, and that Manning's teams took away the whole, including some which had not been measured. The quantity, as stated in the bill made up by defendant after their measurements, was adopted as the basis of settlement, and defendant was paid a sum of £489 17s., part of the payments being by two notes, each for £163 5s. 8d., one at three, the other at six months. Manning, who was plaintiff's only witness, swore that the first of these notes was raid by himself and plaintiff; that they dissolved partnership, and that plaintiff paid the last note. He swore also that he and defendant's son went over what had been previously measured and estimated by defendant himself, and found a great deficiency, and on the whole quantity mentioned in defendant's bill there was a deficiency amounting to £74 8s. 9d, to recover which sum back this action was brought. Manning's evidence was contradicted in some particulars by witnesses called for the defendant, who stated facts calculated to shew that the quantity contained in the piles rather overran than fell short of the quantities upon which the settlement was made. For the defendant, it was objected that plaintiff paid the last note with a full knowledge of the facts, and after the dissolution of partnership between himself and Manning and that, instead of bringing this action to recover back a portion of what he had paid, he should have brought a special action for not delivering the quantity agreed upon and settled for, for it appeared that defendant had written a letter to Manning, in which he stated the quantity, and added that he would guarantee the forthcoming of that quantity, upon which the settlement was made, and the notes at three and six months were given.

Leave was reserved to move for a nonsuit on this objection, and the jury found for plaintiff with £74 8s. 9d. damages.

James Boulton, obtained a rule nisi accordingly, asking also, if the nonsuit was refused, for a new trial on the law and evidence, and for misdirection.

Freeland shewed cause, stating that the money on the last note was paid to parties to whom defendant had indorsed the last note, and not to defendant himself, and that plaintiff was therefore compelled to pay this money. He cited 3 M. & S. 349, 378; 12 East, 38; 2 Ex. 471, note.

DRAPER, J., delivered the judgment of the court.

The case of Cox v. Prentice (3 M. & S. 349) certainly does not apply, for there the payment was made while both parties were under the same belief as to the facts; an error was afterwards discovered, and then plaintiffs tendered back the article and demanded the money, which being refused, they recovered as for money had and received.

Gomery v. Bond (3 M. & S. 378) does not apply either, the question being, whether the plaintiff, by a request he made to defendant, had not waived the contract on which he sued.

Chatfield v. Paxton, cited in the note to 12 East, 38, is distinguished by the court as proceeding on the mistake of the person paying the money, under an ignorance or misconception of the facts of the case, and so is Bize v. Dickason (1 T. R. 285), while Stevens and Lynch, which is the case reported in 12 East, 38, is an authority for defendant; for being the drawer of a bill of exchange, and knowing that time had been given by the holder to the acceptor three months after it was due, he said he knew he was liable, and if the acceptor did not pay it, he would. It was held that, having made the promise with a full knowledge of the circumstances, he could not defend himself on the ground of his ignorance of the law.

Besides Chatfield v. Paxton, which is reported at more length in the note to 2 East, 471, is not a case of any authority, for reasons given by Lord Ellenborough in Bilbie v. Lumbey (2 East, 469), in which case Lord Ellenborough asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law.

In the notes on Marriott v. Hampton in 2 Smith's L. C. 7 T. R. 269, this proposition is laid down as clear, that

money paid with full knowledge of the facts, is not recoverable if there be nothing unconscientious in the retainer of it; and in Kelly v. Solari (7 M. & W. 54) Lord Abinger says, "the safest rule is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no frand on the other side, he cannot recover it back again.

This rule appears to us decisive of the present case, for the plaintiff did not pay this note until long after the deficiency of the measurement he complained of was known to his partner Manning, while the partnership continued, and therefore known to himself. The qualification of the rule as given by Lord Abinger does not affect the defendants, for no fraud is suggested as regards him; and indeed if the jury had found a verdict for him on the question whether the deficiency asserted by Manning really existed, we could not say the finding was unsupported by evidence. Mr. Freeland, indeed, argued on the assumption that the plaintiffwas obliged to pay this money because the note was in the hands of third parties against whom this defence could not have been set up. in the first place, that assumption is not founded on any evidence before us; and even if it were true, it might not, under all the circumstances of this case, be conclusive in his favor.

In our opinion, the rule for entering a nonsuit should be made absolute.

Rule absolute.

DICKINSON FLETCHER V. MUNICIPALITY OF THE TOWNSHIP OF EUPHRASIA.

WHITE V. THE MUNICIPALITY OF COLLINGWOOD.

By-law—Intendment in favour of—Township levying money for county purposes.

A township by-law was quashed as to so much of it as related to the raising a sum of money to defray the demands of the county council on the township, and as an equivalent to the government school grant, &c., it not appearing on the face of it that it was directed to the purpose of meeting a deficiency, nor even that there was any, if that would have authorized the by-law.

Semble, however, that a township council has not power to pass a by-law

imposing a rate in aid of any county rate.

It does not appear necessary that a township by-law should set forth the estimates on which it is founded; and the court will intend that proper estimates have been made, in the absence of evidence that they are wanting: nor that the by-law should state that the rates are calculated at so much in the pound on the actual value; and in the absence of anything to the contrary the court will intend that the council has followed the directions of the statute.

Cosens obtained a rule in Hilary Term calling on this municipality to shew cause why the by-law of 7th November, 1854, for raising £440 13s. 7d., should not be quashed, on the following grounds:

1st. That it purports to raise a tax for county purposes, which is within the province of the county council, and is carried into effect by a by-law passed by that body; the township council having no power to pass such a by-law. He referred to 12 Vic. ch. 81, sec. 41, sub-sec. 22; and to 16 Vic. ch 182, secs. 32, 33, 34, and 39.

If the township had such a power, the same sum would be levied twice over-1st, under county rate, 16 Vic. ch. 182. secs. 34, 39; 2ndly under township rate, sec. 39.

The township by-law could not be founded on an estimate, for they could form no estimate of what the county would require.-16 Vic. ch. 182, sec. 31.

The township council have no power to interfere with a county rate, either to enforce or to alter it .- 12 Vic. ch. 81, secs. 29, 40; and 16 Vic. ch. 182, secs. 34, 42, 45, 54, 55, 69, 70, 85; 14 & 15 Vic. ch. 109, sec. 36; and 12 Vic. ch. 81, secs. 177, 179.

2ndly. They have no power to pass a by-law levying double the amount required by county by-law for county purposes, as it appears they did by the township and county by-laws filed.

3rdly. They had no power to levy money by a tax, as an equivalent to the government school grant: it is not within their power.—13 & 14 Vic. ch. 48, secs. 18, 20, 27, as amended by 16 Vic. ch. 185.

This rate also, if good, would be levied twice, for the same reasons as in preceding objection.

The township are not supposed to have the amount of the school grant officially before them, for such amount is to be certified by the chief superintendent of schools, to the county council through the county clerk.

4thly. That the by-law, so far as it relates to rates for township purposes, should set forth the *estimate* of the sums required therefor.

5thly. That the by-law should state the assessed value of the property of the township, and whether the rates for raising the sum required by the estimates were made on the actual or yearly value of the property.—16 Vic. ch. 182, sec. 31; In re Hawkins v. Municipal Council of Huron, Perth, and Bruce, 2 C. P. 113, per Sullivan, J.; 12 Vic. ch. 81, sec. 31; 14 & 15 Vic. ch. 109, sec. 55; 16 Vic. ch. 182, sec. 31.

He filed the affidavit of complaint verifying the copy of the by-law, together with a copy (properly verified) of by-law No. 8 of the county council of Grey, passed 3rd June, 1854; also a copy (properly verified) of another by-law of the county council, of 22nd June, 1854.

The by-law moved against recited the necessity of raising £313 13s. 1d. to defray the demands of the county council on the township, at the rate of $2\frac{5}{6}d$. in the pound on all ratable property in the township, and of raising as an equivalent for the government school grant the sum of £17, at the rate of $\frac{1}{6}$ th of a penny in the pound; and of raising £110 10s. 6d., to defray expenses of the township, at the rate of one penny in the pound, and enacted that there be levied £440 13s. 7d. for the aforesaid purposes, stating each of them with the sum required for each, the last being stated thus; "to meet and defray the expense of the different township officers, and other miscellaneous charges connected with this municipality."

The enacting clause did not say on what property the rate

was to be imposed, nor did the by-law refer to or state an estimate of the expenses, shewing the appropriation of the £110 10s. 6d.

The by-law of the county council No. 8 directed the raising of £2356 16s. $4\frac{1}{2}d$. by a uniform rate of $1\frac{1}{2}d$. in the pound on the whole ratable property in the county, as shewn by the revised assessment of the townships forming the county of Grey, and stated each township, the value of ratable property therein, and the amount of the rate imposed; stating Euphrasia £25,000—£156 7s. 7d.

The other by-law of the county council, No. 7, enacted that the following sums be assessed as an equivalent to the government grant in aid of common schools in the respective townships, naming them all, and among them, Euphrasia, £17.

In this term Hagarty, Q. C., shewed cause.

He urged that this municipality had no general fund out of which to pay deficiencies—that the county council by-laws would not produce the sums named, because much land in Euphrasia belonged to non-residents, and the rates on their lands could not be immediately collected, and consequently, that there must be a deficiency, which the township had to pay; and having no general purpose fund, being comparatively a new and poor township, thinly settled as yet, the money, if not raised by them by some by-law to meet the deficiency, might be, under the stringent provisions of the statute, raised almost at once, by a sale of township property. He urged the court to point out what course the statute permitted or directed under such circumstances, if this by-law was in that respect illegal. He defended it against the 4th and 5th objections, and cited 13 & 14 Vic. ch. 64, sched. A, sec. 172; 16 Vic. ch. 182, secs. 31, 33, 69, 85: 13 & 14 Vic. ch. 48, sec. 27; 16 Vic. ch. 185, sec. 22; Hawkins v. M. C. of Huron, 2 C. P. 89; De La Haye v. Gore of Toronto, 2 C. P. 322; Canada Co. v. M. C. of Middlesex, 10 U. C. R. 93.

DRAPER, J., delivered the judgment of the court.

We are of opinion that so much of this by-law as relates to the raising £31313s. 1d. to defray the demands of the county council, and to the raising of £17 as an equivalent for the

government school grant, must be quashed. The 31st section of 16 Vic. ch. 182, authorizes the county council to pass bylaws to raise moneys for county puposes, and the township council for township purposes; and as to the equivalent for the school grant, the 13 & 14 Vic. ch. 48, sec. 27, expressly makes it the duty of the county council to cause to be levied, each year, upon the several townships of each county, such sums of money as shall at least be equal, clear of all charges of collection, to the amount of school money apportioned to the several townships out of the government grant.

To raise moneys for those same purposes to the full amount in one case, and to double the amount in the other, is, on the face of it, beyond the power of the township council, for it is exercising a power not only not conferred upon them, but expressly conferred on another municipal corporation.

The only argument offered to justify this course was, that the township council had ascertained, that owing to the large proportion of landsheld by non-residents, a sum very far short of that imposed by the county by-law, would be collected by the collector upon the roll: that a considerable deficiency would remain to be made up, which the township treasurer would have no funds to meet; and therefore such a by-law was necessary to supply those funds, and to prevent a warrant being issued by the treasurer of the county under 16 Vic. ch. 182, sec. 85.

For the purposes of this argument we will assume the object and intentions of the township council to be what are stated, and that the facts on which they rely as requiring them to take this course exist, though, if our decision had to rest upon any such ground, it would have been indispensable that all those facts should be established before us; but we think, assuming everything suggested, that will not sustain the bylaw, which is not on the face of it directed to the purpose of meeting a deficiency, and does not even suggest any, if that would enable the township council to raise money by by-law expressly to meet it; and even then it would seem premature, for all that is shewn.

For myself, I may add, that on examining the statute, I think its provisions have been very carefully framed to obviate the difficulties suggested by Mr. Hagarty.

The thirty-first section, in directing estimates to be made of all sums required, directs the municipality to make "due allowances in such estimate for the cost of collection, and the abatements and losses which may occur in the collection of the tax, and for taxes on non-residents' lands which may not be collected."

Under the 33rd section the county council are required, in apportioning the county rates on the different townships, &c., to make the ratable property returned in the assessment roll of such township, &c., for the next preceding financial year, the basis of such apportionment, so that they have before them the same information that the township council have, through the assessment rolls, to enable them to make the allowances stated in the 31st section, in framing their estimates, and we must, we think, presume they have done so.

Then, further to prevent difficulties, the county council are, by section 70, enabled to issue debentures payable within eight years, on the credit of the non-resident land fund, so as, in effect, to have the money in hand before payment of the taxes due on such lands can be enforced under the 55th section of the act, while the 72nd section makes provision for each separate township, &c., getting its ratable proportion of the non-resident land fund, when it is paid into the hands of the county treasurer.

Looking at these various provisions, we are not prepared to assert the power of the township councils to pass a by-by-law of their own, imposing a rate in aid of any county rate, though, as it is not necessary for the purposes of the case, we do not now pronounce any positive opinion.

We do not see any force in the other objections urged to the by-law. We are not to assume that the township council have not proper estimates on which their by-law is founded; and in a by-law like the present, the statute does not make it indispensable that they should be recited.

This is not a by-law for creating a debt or contracting a loan, and therefore not within the provisions of 14 & 15 Vic. ch. 109, sec. 4; and we might, we think, hold that the mentioning a specific sum as to be raised for specific purposes, might be treated as the setting forth an estimate that such sum was required for those purposes.

Nor do we see any force in the fifth objection. The 31st section declares that in counties and townships, the several rates shal be calculated at so much in the pound upon the actual value, and in cities, towns, and villages, upon the yearly value.

We ought to intend that the township council has obeyed this direction, nothing to the contrary being in any way shewn.

THOMAS B. WHITE V. MUNICIPALITY OF COLLINGWOOD.

This was a similar application by Cosens to quash a bylaw passed on the 6th September, 1854.

The objections taken were :-

1st. That the council had no authority to pass a by-law raising a tax for county purposes.

2nd. That the rate fixed is for county and township purposes in the aggregate, the one not being distinguished from the other.

3rd. That there are no estimates of the necessary township expenses set forth in the by-law; no sum fixed in the pound as a necessary rate; the actual assessed value of property in the township not mentioned; no purposes mentioned sufficiently specific to shew for what purpose the rate of 3d. in the pound is needed.

•4th. That the rate is enormous.

The rule nisi was served on the reeve and township clerk early in March last.

The duly certified copy of the by-law was put in as follows: "By-law, &c., (the title) Be it enacted by the municipal council in council assembled, that the sum of three pence in the pound be levied and raised on all ratable property, to raise the sum of £375, to defray all expenses on the township for the current year, county and township included, and a portion of said sum to be laid out on the repairs of roads and bridges as the council thinks most wanted, and if any balance remain, to be handed over to the credit of the township for the ensuing year.

A duly certified copy of a by-law, numbered 8, of the county council, passed 23rd of June, 1854, in which the township of Collingwood is rated at the sum of £153 2s. 6d. for county purposes, for the year 1854, was also put in.

No one appeared to oppose this rule.

DRAPER, J.—In our opinion this by-law must be quashed altogether. As to the part imposing rates for county purposes, it is bad for the reason given in the preceeding case. And then this by-law affords no means for telling how much must be deducted from the sum of £375 directed to be raised, nor yet can it be ascertained how much the rate of 3d. in the pound must be reduced, in order to raise that portion of the £375 which the township council had authority to impose. There are also other apparent objections to this by-law, which it is not necessary to advert to for the purpose of sustaining our judgment.

Rule absolute.

WITTROCK V. HALLINAN.

The assignee of a reversion cannot recover rent accrued due before the assignment.

DEBT, upon replevin bond. Plea-Never indebted.

At the trial, before Burns, J., at the last assizes at Toronto, the execution of the bond was admitted. An exemplification of the judgment was put in, whereby it appeared that the amount of the judgment recovered by the landlord against the tenant was £53 19s. 11d. It was contended this should be reduced by the sum of £20, being for rent which was due before the transfer of the reversion by the former landlord to the plaintiff.

A verdict was taken by the plaintiff for £53 19s. 11d. by consent, subject to the opinion of the court whether it should be reduced by deducting £20, which was admitted to be rent before the transfer of the reversion.

Gwynne, Q. C., for the plaintiff, cited Arch. L. and T. page 109, Ed. 1846. Hallinan, contra.

Burns, J., delivered the judgment of the court.

It seems to be clear that where rent has been reserved upon a lease and becomes due before the reversion has been assigned, it becomes a chose in action, and cannot be transferred after breach. Notwithstanding the assignment, the assignor can maintain an action on the covenant for a breach in his own time, for non-payment of rent accrued due before the reversion transferred—See Platt on Covenants, 538, and cases there cited. The right to distrainor or to maintain debt for the rent, being remedies existing by reason of the privity of estate, becomes extinct by reason of the transfer, as respects the assignor. It is quite clear also, that the assignce of the reversion cannot maintain an action upon the covenant, though running with the land, unless the breach be a continuing one in respect of something, the right to which has been transferred. Rent past due is not a matter which passes by the transfer. If the assignee of the reversion could maintain debt for such rent or distrain for it, then it must follow that the tenant would be liable to different persons at the same time for the same thing, provided he had entered into a covenant for the payment of rent. The reversioner only acquires the same rights over and as against the tenant, from the time the reversioner acquires the reversion which the landlord has in respect of the covenants, and the same rule must hold with respect to the right to distrain, otherwise the absurdity must exist, that one person might distrain a tenant's goods for rent, while another person was bringing an action The verdict should be reduced to the sum of for it. £33 19s. 11d.

Rule accordingly.

PHILLIPS V. HUTCHINSON.

Malicious arrest-New trial-Verdict under £20.

When a verdict is under £20, and no permanent right is bound by it, the court will not be disposed to interfere, unless it appears to be clearly perverse, or the judge who tried the cause reports that he is dissatisfied.

Case for malicious prosecution of the plaintiff for felony. Plea, not guilty.

The following facts appeared at the trial, at the last Toronto assizes, before *Macaulay*, C. J. On the 2nd of September, 1854, the defendant laid an information upon oath before

George Gurnett, Esquire, police magistrate for the City of Toronto, that forcible possession had been taken of a schooner called the "Hebe," the defendant's property, as he (defendant) believed, with the felonious intent of appropriating the same to their own use, by the plaintiff and one Fellowes, whereupon he prayed that a warrant might issue for their arrest. This was done, and the plaintiff was brought before the magistrate. It was sworn that Fellowes had previously been master of her, and had given up the papers, &c., to another person appointed by the defendant as master. was in June, 1854; and in August, 1854, she was laid up at the back of the fish market in Toronto harbour. On the 2nd of September she was moved to another part of the harbour, and preparations were made apparently for setting sail on her. The plaintiff and Fellowes were shewn to be the persons who moved her; they had a professional man with them. On the issue of the warrant, the police officer went and hailed the vessel, and called the plaintiff and Fellowes on shore, stating what he wanted. They came on shore, and were arrested. The defendant swore that Fellowes had no authority to move the vessel, nor any rightful claim to or interest in her, but he further stated that this vessel had been abandoned by the former owners to an insurance company; that they sold her, and an arrangement was made by which the defendant became the purchaser, on condition that when the defendant was reimbursed in the sum for which he became responsible as the purchase-money and five hundred dollars more, then he was to account to Fellowes for and give up possession of the vessel to him. In the interim the defendant was to have the whole proceeds, and the plaintiff was to have no control over her until the defendant was reimbursed, which he swore he had not been. The police magistrate, after hearing some evidence for the plaintiff and Fellowes, dismissed the charge. The defendant stated at the examination in the police office, that Fellowes had become the maker of the notes given for the price of the vessel, and that he had endorsed them. The plaintiff, it appeared, had been mate under Fellowes, and went on board the "Hebe" with him on 2nd of September. For the defence it was proved that every thing on board was

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closed up; the cabin door and hatches fastened: and that Fellowes forced them open. Mr. M. C. Cameron proved that the defendant consulted him on the 2nd of September, stating that Fellowes had removed the vessel, and stating the same facts as to the purchase as were proved on the trial; that he (Mr. C.) went to the end of Jarvis's wharf and saw plaintiff on board the vessel, who told him Fellowes had put him in charge, and he would not give her up. That he (Mr. C.) assuming the truth of the facts stated by the defendant, advised him that Fellowes' conduct would amount to felony; that defendant acted entirely on his (Mr. C.'s) advice, and did not deceive him in any part of his statement. The learned Chief Justice left it to the jury, saying that if the defendant laid the case fully and fairly before counsel, and acted bona fide on his advice, it was evidence to prove probable cause, though the opinion was erroneous. If not, then whether the defendant acted maliciously or not was a question for them, as well as the damages. They gave the plaintiff a verdict for £5.

M. C. Cameron obtained a rule nisi for a new trial on the law and evidence, and because the verdict was against the judge's charge.

Dempsey shewed cause.

Vankoughnet, Q. C., supported the rule.

DRAPER, J., delivered the judgment of the court.

In this case, no misdirection is complained of on the part of the defendant, and this is to be remembered in disposing of the application for a new trial. For, if the error be in the rejection or reception of material evidence, or in directing the jury upon matter of law, then a new trial is generally of right, provided (and this is sometimes not sufficiently attended to at Nisi Prius) that the counsel has in due time raised the objection, and the verdict has passed against his client, unless indeed it is clear that the misdirection or rejected evidence could not have had any effect on the jury, and did not influence their verdict—Wright v. Doe dem. Tatham (7 A. & E. 313). When, however, the fault is with the jury, that they have given their verdict against the weight of evidence, or against evidence, the general rule is that a new trial will only be granted on payment of costs; and so also even when the verdict

is against the judge's charge, though under particular circumstances costs are ordered to abide the event, or, if the verdict be perverse, a new trial will be ordered without costs.

The courts have, however, in exercising their discretion as to new trials when the error is with the jury, made it a strict rule not to send the case to another jury (unless when they would do so without costs, and this but very rarely) if the verdict be under £20; and this rule is not governed by the form of the action, as it applies in actions of tort as well as of contract, unless indeed some permanent right or interest would be bound by the verdict.

In the present case the verdict is against the direction, which was, that if the defendant bona fide submitted all the facts of his case to counsel, and acted upon his opinion as to the law, there was reasonable and probable cause for the arrest of the plaintiff, and therefore the defendant should have a verdict, although the opinion of the counsel was clearly erroneous.—Unless a verdict in the plaintiff's favour after such a charge be perverse, we could not grant a new trial, except upon payment of costs. The strongest case I have seen in defendant's favour is Freeman v. Price, (1 Y. & J. 402), but later cases do not quite accord with that decision. See-v. Phillips (1 Cr. & M.26). In Sowell v. Champion (6 A. & E. 407), which was trespass de bonis asportatis, the court refused a rule nisi for a new trial, on the ground that the verdict was against evidence, when the damages were below £20, though the case was stated to be of general importance, as relating to the boundaries of a jurisdiction-See observations of Maule, J., (in 11 C. B. 654). The last case I have seen is Allum v. Boultbee (9 Ex. 738), in which (dissentiente Martin, B.) the court somewhat qualified the rule as to refusing a new trial when the damages were under £20. Some effect was probably given to the fact that in England the parties may be examined in support of their own case, and the judge who tried the cause reported his dissatisfaction with the verdict.

In the present case, we cannot say the verdict is perverse. The learned Chief Justice does not report to us any dissatisfaction on his part. We think we could only interfere on

payment of costs, and the strong weight of authority is against our interfering when that is so, and the verdict is for so small a sum as £5.

Rule discharged. (a)

REGINA EX REL. GLEESON V. HORSMAN.

A county court judge cannot grant a quo warranto during term time in the superior courts.

Eccles obtained a rule calling on the relator to shew cause why the order made by the judge of the County Court of the county of Oxford, for the summons in the nature of a quo warranto in this cause, should not be set aside with costs, on the ground that the said order was granted during last Hilary term, when the said judge had no power or authority to grant the same.

It was sworn that the fiat for the summons was granted by the judge of the Oxford county court, on the 10th of February last, on which day the writ of summons issued, and which day was the first Saturday in Hilary term. On the same day the judge also granted his fiat for a summons against the returning officer. Both summonses issued and were served, but neither of the defendants appeared, and the judge gave judg ment against them ex parte.

Hagarty, Q. C., shewed cause.

DRAPER, J., delivered the judgment of the court.

The language of 16 Vic. ch. 181, sec. 27, appears too clear to admit of any argument. This section is substituted for the 146th section of 12 Vic. ch. 81, amended by 13 & 14 Vic. ch. 64, sched. A, number 23. It provides that in certain cases, of which the present is one, a writ of summons in the nature of a quo warranto shall lie to try the validity of such election, &c., &c., "which writ shall issue out of either of her Majesty's superior courts of common law at Toronto, upon an order of such court in term time, or upon the fiat of either of such courts, or of the judge of the county court having jurisdiction over the municipality within which such election shall have taken place, in vacation."

Rule absolute.

⁽a) See Fellowes v. Hutchinson, 12 U. C. R. 633.

HUNTER V. BORST.

Wharfinger and warehouseman--Duty of, where address on packages differs from that in abstract-Pleading.

Certain packages were sent from New York by the Canandaigua and Nigara Falls Railway, addressed to the plaintiff at Hamilton, to go on by the Great Western Railway from the Falls. A bill of freight and charges due the Canandaigua and Niagara Falls Railway was made out to the Great Western Railway. In consequence of a telegraphic communication,—of which defendant knew nothing,—the address to Hamilton entered on this bill was struck out and Toronto substituted, and G. W. R. R. was also struck out and E. & O. R. R. (meaning Erie and Ontario Railroad) put in its place, but the address on the packages was left unchanged. They were brought by the Erie and Ontario Railroad to Lewiston, and thence shipped to Toronto, where defendant, a wharfinger, received them, with an abstract in which they were described as addressed to plaintiff at Toronto. Defendant, relying on the address to Hamilton, which still remained on the cases, shipped them to that place, and they were burned on the passage.

Held, that it was properly left to the jury to say whether defendant was guilty of negligence in going by the address in the abstract, instead of that on the packages, and that they rightly decided in his favor.

Held, also, that the fact of defendant being described in the declaration as a wharfinger and forwarder, and not denying either character, could not make him liable as a forwarder, in face of the evidence.

CASE. The first count of the declaration stated, that defendant was a wharfinger and forwarder of goods at Toronto, and it was his duty to receive goods for all persons to whom the same might be assigned, and to store and keep them at his wharf and store house, and to forward the same as he might be directed, for certain reward: that certain goods of the plaintiff (a printing press, &c.,) were consigned to the plaintiff at Toronto by certain persons in New York, by railroad and steamboat, and were unshipped at the Queen's wharf at Toronto, and from thence carried by defendant to a storehouse, and were received by defendant in the way of his business aforesaid, to be stored for the plaintiff, and to be delivered to the plaintiff there for certain reward: that it became defendant's duty to store the goods for the plaintiff. and to deliver them to him: that the plaintiff in a reasonable time requested such delivery, and was ready to accept the same and to pay defendant's charges. Breach-that defendant before plaintiff's request, wrongfully, negligently, and improperly put the goods on board a steamboat called the "Queen City," bound for Hamilton; that the steamer sailed with the goods on board, and on the way to Hamilton she and the said goods were destroyed by fire. Second count, in trover.

Pleas—1st. Not guilty. 2nd. That the goods were not forwarded or consigned to the defendant. 3rd. That defendant did not accept or receive the said goods, in manner and form, &c. 4th. That after the delivery to him of the goods, and before the commencement of this suit, defendant delivered them according to his duty and retainer. All these were pleaded to the first count. To the second, defendant pleaded plaintiff not possessed. The fourth plea was demurred to, and issue taken on all the others.

The case was tried at the Toronto spring assizes, before Macaulay, C. J. It appeared that thirteen cases, containing a printing press, types, &c., were sent from New York by the Canandaigua and Niagara Falls Railway. They were addressed to Dr. J. Hunter, Hamilton, to go on by the Great Western Railway from Niagara Falls to Hamilton. A bill of freight and charges due to the Canandaigua and Niagara Falls Railroad was made out, "G. WR. R.," -meaning Great Western Railroad—debtor for these charges. In consequence of a telegraphic communication, the address to Hamilton, entered on this bill, was struck out, and Toronto substituted, "G. W. R. R." was also struck out and "E. & O. R.," meaning Erie and Ontario Railway, was put in place thereof. The address on the thirteen cases was not altered: Hamilton remained thereon as before. They were brought by the Erie and Ontario Railway to Lewiston, and were there shipped on board the steamer "Welland," in which vessel they were brought about the middle of January last, to the Queen's wharf, Toronto, where the defendant received them with an abstract, as follows :-

Browne's wharf, Toronto, 16th Jan., 1855.

"The steamer Welland, ——Master, arrived here this day from Lewiston, bringing bills of lading of the following property said to be on board, with the undermentioned charges thereon. No claims of damages allowed if not assessed before removal of goods from wharf. Fire, leakage, rattage, and unavoidable accidents, at risk of owners. Freight and charges payable on delivery.

P. W. H.

MARKS AND NUMBERS.	Pieces.
Dr. Hunter, Toronto.	1 printing press frame. 2 packages type frames. 2 boxes machinery. 6 " type. 1 case drawers. 1 case.
	Amount.
Steamer's charges	£8 11 3 0 15 0 0 7 6
	9 13 9
Receiving and shipping	0 10 0
	10 3 9
(Signed)	M. J. Borst & Co.,

"To be bonded at Hamilton."

On the 22nd of January the defendant shipped eight of these packages, according to the address upon them, by the steamer "Queen City," for Hamilton. She was burned soon after, and these eight cases were destroyed in her. The witness who proved these facts was in defendant's employ. He further said that defendant was a wharfinger in Toronto: that they received different goods from the steamer together with the thirteen cases, all being accompanied with an abstract of the goods. The negligence complained of, and which was the foundation of the action, was the shipping the thirteen cases to Hamilton. At the close of the plaintiff's case the defendant's counsel objected that the plaintiff contributed substantially to bringing about the loss complained of, and leave was reserved to move for a non-suit on this ground. The learned Chief Justice left the case to the jury, as turning on the question of negligence, stating that if the goods were received to forward, and the defendant did not know the actual consignee or his residence, and bona fide shipped them for Hamilton, whether inadvertently overlooking the place in the abstract or supposing it an error, he did not think it negligence in law, ipso facto, but for the jury. That, if a pure question of law, the defendant was authorized to go by the packages, according to all that appeared in evidence. The defendant had called a witness, who stated that he was familiar with the forwarding business: that it was not uncommon for the abstract to vary from the address on the cases; but if so, they did not go by the abstract. If the original bills were received, they should. The plaintiff's counsel objected to this evidence, which was not persisted in, though the learned Chief Justice noted that he was willing to receive evidence of other wharfingers as to what they, as conversant with the trade, considered the usual course or duty of the forwarder or wharfinger receiving goods with a variation between the address on the parcels and that stated in the abstract or way-bills.

The jury found for defendant.

Eccles moved for a new trial, the verdict being against law and evidence; and for misdirection, in leaving the question of negligence to the jury as a matter of fact to be decided by them, instead of directing them, as a matter of law, that the sending the goods contrary to the address in the abstract was negligence.

Hagarty, Q. C., shewed cause.

Eccles, contra, cited Smith v. Whiting, 3 O. S. 597; Thirkell v. McPherson, 1 U. C. R. 318; Forward v. Pittard, 1 T. R. 27; Hyde v. Trent Navigation Company, 5 T. R. 389; Fowler v. Hooker, 4 U. C. R. 18; Streeter v. Horlock, 1 Bing. 34; Garnett v. Willan, 5 B. & A. 53; Sleat v. Fagg, Ib. 342; Cairns v. Robins, 8 M. & W. 258; Mitchel v. Ede, 11 A. & E. 888.

DRAPER, J., delivered the judgment of the court.

Mr. Eccles, among other arguments, has pressed upon us, that in the declaration the defendant is stated to be both a wharfinger and forwarder, and does not deny either of those characters: that this court, many years ago, held that forwarder was synonymous with common carrier, and that in this character the defendant was clearly liable for all accidents,—the act of God and of the Queen's enemies only excepted,—and he likened the case to Hyde v. The Trent Navigation Company.

We think, however, this argument cannot prevail. The first count in the declaration charges the duty and the negligence to be of a specific character, suitable to what was really urged at the trial, but quite different from the duty of a com-

mon earrier, or from a liability as a quasi insurer against all risks but the two excepted; and the case was not presented at all in that respect to the court or jury. Nor would the court grant a new trial on a ground which really has no substantial merit in it; for if the defendant had traversed his being a common carrier, on the evidence as given at the trial he ought to prevail. We look on him to have received these goods as a wharfinger and warehouseman, and that his duty was todeal with them according to the directions he received with them, within the scope of his business in that character.

If the defendant had, with these goods, received instructions, either in direct terms or in such a manner as to lead to that conclusion, to retain them in Toronto, then we agree that his disposing of them otherwise—ex. gr., sending them to Hamilton—was a clear breach of duty, and that the jury, as a matter of law, should have been so directed.

But the fallacy of the argument lies in assuming this as established, when it is the very matter of fact in dispute, and which, as a matter of fact, was necessarily to be determined by the jury.

The defendant's duty arose from the directions which accompanied the goods when he received them. It was contended at the trial and on the argument that those directions were contained in the abstract delivered by the purser of the "Welland" with the goods. If this is so, then the defendant disobeyed them. But whether this was soor not was a question of fact, which the jury have determined, and we think rightly determined, in the defendant's favor. This abstract is not a document proceeding from the plaintiffor his consignor, or any one acting as agent for him. There is nothing in it to give such a character to it. On the contrary, it is a sort of partial manifest of the cargo of the steamer; similar papers being made out, it is said, of each quantity of goods sent to one address. notifies certain facts respecting certain goods; and in the first column professes to give the marks and numbers of those very goods. My present strong inclination is, that the jury might have been told that on this account—namely, that this abstract, as regarded the marks and numbers on the thirteen packages, professed only to give what was on those packages—they

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might more properly consider that as done for the purpose of identification of the packages, than as containing any directions as to what was to be done with them; and that when, on comparing them as stated on the abstract with those on the packages, the defendant had much more reason to conclude the error was with the purser of the "Welland" who made out the abstract, than with the party who put up and addressed the goods. What difference it might have made if the defendant had been apprised of the telegraphic communication and the alteration of the destination of the goods, is not a question arising now, as it appears the defendant knew nothing of this. But it certainly does not weaken the defence that the party who changed the line of transport by sending the goods via Lewiston to Toronto, instead of by the Great Western Railway to Hamilton, -and who apparently acted by instructions from the consignor and his agent, did nothing to change the address of the packages, and so far as appears, gave no instructions to any body to prevent the misfortune which afterwards happened. We think this rule should be discharged.

Rule discharged.

CALCUTT V. RUTTAN.

Replevin-Pleading-Right of property.

Where replevin was brought against the sheriff for a seizure under execution made by his deputy: *Held*, that, as defendant was obliged to shew that the seizure was made under process in order to connect defendant with the act, it was not necessary to plead specially, but that under *non cepit* defendant might avail himself of the 18 Vic. ch. 118, which enacts that replevin

shall not lie under such circumstances.

Under an execution delivered to him on the 16th of November, the sheriff seized on the 17th; the plaintiff, another creditor, was then at the debtor's shop receiving delivery of some crockery which the debtor was selling him in order to satisfy his claim. These goods were proved to have been set apart for the plaintiff, and to have been marked with his mark, and one of the articles had been delivered to him in the name of the whole. Part had been removed, and the rest was detained and secured by the sheriff. Plaintiff having replevied—

Held, that under a plea of not possessed, defendant was entitled to averdict.

REPLEVIN, for a quantity of merchandize.

Pleas, 1st. Non cepit. 2. Plaintiff not possessed. 3. That one Nourse was possessed.

At the trial, at the last assizes held at Cobourg, before Burns, J., the facts appeared as follows: The defendant was sheriff of the united counties of Northumberland and Durham, and had in his hands a writ of execution of Nourse v. Nourse, placed there on the 15th of November, 1854. Another writ came to his hands on the 16th of November, of Smith v. Nourse. On these writs the deputy sheriff, on the 17th of November, went to the shop of Nourse, and there seized all the goods. At the time the deputy sheriff went to Nourse's shop the plaintiff was there, receiving delivery, it was said, of a quantity of crockery, which Nourse was selling to the plaintiff in order to satisfy a debt due by him. amount of the crockery so sold was £130. It was proved to have been contained in the cellar of the shop, and to have been set apart for the plaintiff, and to have been marked with his mark, and a tea-pot was delivered in the name of the whole. A portion of the crockery had been removed in the course of the day before the deputy sheriff came to seize; the seizure was made on the 17th of November. The plaintiff desired to remove the residue of the crockery, but the bailiffs prevented him, and claimed it upon the writs of execution. The crockery was replevied by the plaintiff, and the sheriff was made the defendant in the replevin writ. It was found that the plaintiff held a confession of judgment from Nourse for the whole amount due him, including the sum for which the crockery was to be delivered, and that a judgment had been entered up, and execution issued and endorsed for the whole debt, and placed in the hands of the defendant on the 18th of November, 1854.

A verdict was rendered for the plaintiff, subject to the opinion of the court upon the evidence whether he could recover.

Vankoughnet, Q. C., for the plaintiff. Armour for the defendant.

Burns, J., delivered the judgment of the court.

The passing of the act at the close of the last session of Parliament, declaring that the replevin statute did not apply in cases where executions issued from Courts of Record are acted upon, and the goods are seized and in the custody of the law, puts an end to this suit upon the plea of non cepit, and entitles the defendant to the general judgment. It was argued that to put an end to the suit by reason of the goods being seized upon execution, and for that reason in the custody of the law, it would be necessary for the defendant to plead the facts, in order that the court should have the matter upon the record. It is not necessary that it should be so, because the defendant himself never did take the goods. The seizure was made by the deputy sheriff under legal process, and the plaintiff was obliged to shew that fact, and did shew it, in order to connect the defendant with the trespass. The moment the plaintiff shews that the goods were seized under legal process from a Court of Record, the law at once destroys his right of action, and as the sheriff did not in fact himself seize the goods, he may avail himself under non cepit of that which destroys the plaintiff's right of action. With respect to the right of property, which is brought in question by the other pleas, the defendant is entitled to have the verdict entered for him. The first execution was delivered to the defendant on the 15th of November, and a second on the 16th of November. Both of these were delivered to be executed. The mere delivery of the writ to the sheriff has not the effect of divesting the property out of the execution debtor; that is not altered until execution executed—that is, by sale of the goods. In Samuel v. Duke (3 M. & W. 622), Baron Parke says: "Now it is perfectly clear to me, both upon decided cases and the reason of the thing, that after a writ of execution has been delivered to the sheriff the defendant may convey his property; but that the sheriff has a right to the execution notwithstanding the transfer." Rankin v. Harwood (10 Jur. 704), there was a motion made before V. C. Wigram for an injunction to prevent the sheriff selling goods under these circumstances. - One Kirk recovered a judgment against Harwood, and had issued an execution against his goods to the sheriff of Middlesex, which was returned nulla bona. He then sued out a writ to the sheriff of Surrey, on the 2nd of April. Harwood died on the 6th of April, and on the 7th of April the writ was delivered to the sheriff. On the 6th of June a decree was made in favor of the representatives of Harwood, under which creditors might come in. On the first of July the sheriff succeeded in executing the writ; the house where the testator's goods had been was locked up, and the goods concealed for the purpose of avoiding the execution. The motion was then made to restrain the sheriff from selling, on the ground that as the property of the testator did not pass out of the goods till actual sale, they became vested in the representatives, and the court, by reason of the decree in the administration suit, became entitled to the goods as assets. The Vice-Chancellor refused the motion, and uses this language: "There never could have been an instant of time during which the executor could have dealt with the assets, unless in market overt, (an exception which exists in favor of purchasers only) so as to have prevented Kirk from taking them in execution. If the executor had sold them by private contract to raise money for any purpose of administration, or had delivered them to a creditor of the testator in satisfaction of a debt, Kirk might have followed them; and this, Kirk might have done without noticing the executor." Woodland v. Fuller, (11 A. & E. 859), was an action of trover, brought by the assignees of an insolvent debtor against a judgment creditor. The writ of Fi. Fa. was sued out on the 15th of March, and placed in the sheriff's hands the same day at a quarter past one in the afternoon. On the 14th of March judgment was obtained by another creditor against the debtor, and the same day a Ca. Sa. was sued out, and the debtor arrested thereon, and on the same day was committed to the Queen's Bench prison. On the 15th of March the debtor presented his petition to the Insolvent Debtor's Court, after the hour of three in the afternoon of that day, and the usual vesting order was made that the debtor's effects should be vested in a provisional assignee. At eleven o'clock in the forenoon of the 16th of March the provisional assignee took posession; and at five o'clock in the afternoon of the same day, the sheriff's officers entered. It was held the writ of execution bound the goods, and that the assignee only became entitled subject to the right of the execution creditor. The vesting order was held not to be equivalent to a sale in market overt, and that it could confer no greater right than if the debtor had himself conveyed away the goods, in which case the right of the execution creditor would not be defeated.

The verdict should therefore be entered for the defendant generally.

PARKINSON V. CLENDINNING.

Ejectment—Assignment of agreement for lease—Effect of lease afterwards procured by lessor.

EJECTMENT. Plaintiff claimed under a lease to himself from the City of Toronto, dated 1st January, 1854. Defendant produced a deed poll executed by plaintiff, dated 3rd January, 1848, assigning to defendant and another all his right to the land in question, to hold to them as joint tenants during the time of the lease to be obtained for the same, and authorizing them to demand and receive a lease from the city on the same terms as agreed upon to be granted to himself. At the time this assignment was made, plaintiff held only an agreement for the lease, which lease, notwithstanding the assignment, he had afterwards procured in his own name.

Held, that the plaintiff was not precluded by the assignment from setting up the lease, and therefore that he was entitled to recover.

EJECTMENT for four acres of land on the peninsula, opposite the City of Toronto (described.)

The case was tried in January, 1855, before McLean J., at Toronto. The plaintiff put in evidence an indenture, dated 1st of January, 1854, made in pursuance of the act to facilitate the leasing of lands, between the City of Toronto and the plaintiff, whereby the City of Toronto demised, &c., to the plaintiff the premises in question; habendum from the said 1st of January, 1854, for twenty-one years, yielding, &c. £10 by equal half-yearly payments. The plaintiff covenanted to pay rent and taxes, to repair, keep up fences, not to cut down timber, to remove sand, soil or earth, not to assign or sublet without leave—with various covenants.

The defendant put in evidence a deed poll under the hand and seal of the plaintiff, dated the 3rd of January, 1848, whereby the plaintiff, in consideration of £100, bargained, sold, assigned, transferred, set over and delivered to the defendant and one Alexander Mackenzie all his right, title and interest of and in "that piece or parcel of land and premises,

with the appurtenances, leased as per agreement by me from the Corporation of the City of Toronto, situate on the peninsula opposite the said city, containg five acres; habendum to them as joint tenants, for and during the time of the lease to be obtained for the same; and I do hereby authorize the said John Clendinning and Alexander Mackenzie, or either of them, to demand and receive a lease for the said premises from the said corporation in their joint names, on the same terms and for the same period as agreed upon to be granted to me by the said corporation." It was proved that about three years ago the defendant put up a house on these premises, and plaintiff worked at it as a carpenter, and that last fall the plaintiff offered defendant £125 to give up possession to him. In reply, the plaintiff gave evidence of a conversation between himself and the defendant, from which it might be inferred that there was some writing between them shewing that the defendant held the house only as security for a sum of money.

The learned judge told the jury that the right of the corporation to the property was admitted by the parties, and that the plaintiff shewing title under them was entitled to recover, unless defendant could shew a title in himself. That as it was stated in the assignment of 1848 from the plaintiff to defendant, that no lease had then been made to the plaintiff, and as the plaintiff's only claim was an agreement for a lease, he had in fact no interest that he could assign, and that the plaintiff must recover on his strict legal title, leaving the defendant to any remedy he might have in equity. The defendant's counsel excepted to the charge. The jury found for the plaintiff.

McMichael, in Hilary term, obtained a rule nisi for a new trial on the law and evidence, and for misdirection; to which Vankoughnet, Q. C., shewed cause. Mr. C. Cameron supported the rule.

DRAPER, J., delivered the judgment of the court.

We gather from the charge of the learned judge, that the right of the corporation of the City of Toronto was admitted on bothsides; and then the only question is, whether by reason of anything contained in the deed of the 3rd of January 1848, the plaintiff was estopped from setting up the lease from the corporation to himself, in order to establish his legal right to recover. In that deed the plaintiff conveys to the defendant and another all his right, title and interest to the premises in question, not professing to convey any distinct or definite legal interest, either in fee simple or for any less estate. Then the habendum is, during the time of the lease to be obtained for the same. Perhaps, if it stopped there, it might be contended that this in effect operated to divest himself of a right to the possession, as against the defendant, of these premises for the term that might be granted thereafter to himself by the corporation. But it is followed directly by an authority from himself to the defendant and the other to take the lease in their own names, or in the name of either, on the same terms and for the same term as the corporation were to have granted him (plaintiff) a lease. It is obviously contrary to the letter and the spirit of this assignment, that the plaintiff should have got a lease in his own name and for his own behoof-and so far as this is concerned, the defendant will not be, I assume, without remedy. But that is a very different question from the one now before us, which is whether the assignment prevents the plaintiff in a court of law, from asserting his after-acquired title.

On examining the evidence carefully, it seems almost questionable whether the house spoken of was built originally on the premises mentioned in the lease from the corporation, and there is some apparent confusion as to what premises are actually referred to by some of the witnesses. If it really is questioned whether the premises referred to in the assignment of 1848 are identical with those contained in the lease of 1854, there ought to be a new trial. My brother Burns is inclined to grant a new trial, and I have no objection to concur—costs to abide the event.

Rule absolute.

HUGHES V. THE MUTUAL FIRE INSURANCE COMPANY OF THE DISTRICT OF NEWCASTLE.

Mandamus-Mutual Insurance Company.

A mandamus will be granted only where the applicant has no other specific

legal remedy, not where such remedy exists, but is unproductive.

The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment

by those who had been mutual insurers with the plaintiff, but no longer belonged to the company, their deposit notes having been cancelled. Plaintiff's attorney wrote on the 20th of December to the treasurer of the company, demanding a portion of the claim, and on the 21st received an answer, saying that the defendant's solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney, and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum. Held, a sufficient refusal.

Leith obtained a rule calling on the defendants to shew cause why a peremptory writ of mamdamus should not issue, directing them to pay to the plaintiff £568 9s. 2d.; the amount recovered in this cause, with interest from the entering of the judgment; or £114 19s., part of such judgment; or why a peremptory mandamus should not issue directing the defendants, pursuant to 6 Wm. 4, ch. 18, to settle the sum to be paid by the members of the company who were such at the time of the happening of the loss by the fire alluded to in the affidavits and papers filed, and to publish the same, and on default of any such members to pay, to sue upon their deposit notes, and to apply the moneys to be received by virtue of any such proceedings, towards payment of the plaintiff; and why the settlement of the amounts to be paid as aforesaid should not be had on the basis of the loss having amounted to the sum awarded to the plaintiff, as specified in the affidavit of R. Dennistoun, and interest, less £170 and interest. rule was drawn up on reading the affidavit of R. Dennistoun, and his affidavit filed the 9th of June, 1853, and the affidavit of Archibald McDonald, filed the 10th of September, 1853, used on a former application to this honourable court.

The new affidavit of Mr. Dennistoun stated that the plaintiff, being insured with defendants, suffered a loss by fire in 1846, which was settled by award, whereby £570, exclusive of costs, was awarded to the plaintiff; that this action was brought

in 1846 to recover that amount. The affidavit explained various difficulties and delays in bringing the cause to trial till the spring assizes of 1851, when the plaintiff obtained a verdict for £524, after deducting £170 paid to the plaintiff before suit; that judgment was entered on the 7th of August, 1852, for £524 damages and £44 9s. 2d. costs, all of which remained unpaid; that the deponent, as plaintiff's attorney, applied to David Brodie, defendant's treasurer, for payment of the amount due on the judgment, who told deponent defendants never would pay until compelled by law; that a Fi. Fa. against goods was issued by the plaintiff, returnable the last day of Hilary Term, 1853, which was returned nulla bona; that an Alias Fi. Fa. was issued returnable on the last of Trinity Term, 1854, and was also returned nulla bona; that deponent had made every possible enquiry, and believed that defendants had neither real nor personal property on which any satisfaction could be obtained; that no part of the dåmages recovered had been paid; that he had been informed and believed that the amount due on the award, to recover which this action was brought, had been assessed and paid by the members of the defendant's corporation to the former directors thereof; that he, as attorney, &c., was entitled to receive the money; that the annexed paper marked A. contained a copy of a letter addressed by defendant on the 20th of December, 1854, to D. Brodie, treasurer, &c., and the paper marked B. contained the answer.

The letter referred to marked A, was as follows:-

"Dear Sir,—It appears that the Mutual Assurance Company of the Newcastle District admit having the sum of £114 19s. in their hands due on the judgment obtained against them on the award made infavor of Charles Hughes. I claim the right to receive the money due on the said judgment as the plaintiff's attorney, and now write to ask if you are willing to pay me the above sum of £114 19s. on account, and if so I shall be glad to make any arrangement that may suit your convenience for the purpose of receiving the amount and giving a proper receipt for it. Begging the favor of an early reply.

I am, &c.
(Signed) ROBERT DENNISTOUN."

Reply, marked B, dated 21st December, 1854:-

"Dear Sir,—I am this morning favored with yours of yesterday. Mr. Archibald Macdonald, the late solicitor of the company, not being now a resident here, I have this day written to him on the subject of your letter; when I receive his reply I shall again address you.

(Signed) DAVID BRODIE, Sec. &c. N. D. M. F. I. Co."

The former affidavit of Mr. Dennistoun stated the recovery of the judgment and return of nulla bona to the execution, a demand on the treasurer, and his refusal to pay anything; and that he believed that an assessment had been levied under the statute to pay the loss, to recover which this action was brought; and that the amount was paid to defendant before the judgment was entered.

The other papers put in by Mr. Leith were—a petition presented in September 1846, verified by affidavit from the sheriff of the district of Newcastle, to the Court of Bankruptcy for the same district, setting forth that before the bankruptcy of Charles Hughes, the plaintiff, and before the fire, the sheriff, by virtue of several writs of Fi. Fa., had levied on plaintiff's goods, and, as they were insured, had not removed them from his premises; that afterwards, and while £206 18s. 5d. remained unsatisfied on these executions, as well as the sheriff's fees, the fire took place; that after this, the defendants and the plaintiff submitted the questions arising on the policy of insurance to arbitration, and an award for £570 was made in the plaintiff's favor, which award the plaintiff put into the sheriff's hands as security for the sums still due on the executions; and praying relief: to which petition was attached an affidavit of Archibald Macdonald, defendant's solicitor, stating that at the time the award was made, the plaintiff owed £62 19s. 5d. for assessments due on his promissory notes, as well as for further assessments on the same notes for plaintiff's own loss; that these notes were then in the solicitor's hands for the purpose of collecting these assessments; that the plaintiff then agreed with defendant that if he would stay proceedings on the notes, defendants might retain the assessments out of the amount going to him

under the award; that proceedings were stayed, and the amount due by the plaintiff was charged to him as paid by defendants on the award, and that defendants are entitled to have the same allowed them against the judgment; that defendants paid the plaintiff \$170, which was allowed at the trial, but the sum of £62 19s. 5d., the amount of such assessments, was not allowed; that under the proceedings taken in the bankrupt court, defendants paid the further sum of £222 1s. 7d. on account of the award, leaving due £114 19s., which the company had always been willing to pay to the proper person entitled to receive the same; that the plaintiff's attorney in this cause had due notice of the proceedings in bankruptcy, but no "person appeared on behalf of the person to whom he had assigned the bond," and it was supposed the proceedings were acquiesced in by the plaintiff's assignee, and his claim was treated as a fraud, and that it came out at the trial that there was no debt past due to such assignee at the time the bond was assigned to him; that defendants had paid a large sum in defending the suit, and it would be a great injustice on them to have to pay more then the said sum of £114 19s.

Richards shewed cause, and filed an affidavit from David Brodie, the defendants' secretary, that the policies of insurance entered into by the defendants with parties insured with them at the time the loss by fire was sustained by the plaintiff, were limited to five years in duration; that the plaintiff's loss occurred more than six years ago; that all persons who at the time of the fire were members of the company by virtue of the policies then and theretofore entered into by them with the company, had long since ceased to be members thereof by virtue of the said policies, and that their deposit notes had been given up or cancelled.

DRAPER, J., delivered the judgment of the court.

The demand contained in Mr. Dennistoun's letter of the 20th December last, is limited to the £114 19s. There is no express refusal, but the delay in giving a further answer, and the absence of all allusion to this sum in Mr. Brodie's affiidavit are, it is contended, evidence of refusal pro tanto. His former

affidavit stated a demand and refusal, but in very vague and general terms, not fixing any date, and that affidavit was sworn on the 9th of June, 1853, and has already been used in an application to this court, when its insufficiency in other particulars was pointed out (a), and on this point it is not sufficient to enable us to act upon it. Except as to the £114 19s., we see no sufficient proof of demand; and so far as that sum is concerned, we think the conduct of the defendant's treasurer affords evidence of what is tantamount to a refusal.

Mr. Dennistoun's affidavit further states that he has made diligent enquiry, and believes that the defendants have neither real nor personal property which can be taken in execution. As to personal property, there have been two writs of Fi. Fa. returned nulla bona; and as to lands, in addition to the affidavit, it is to be considered that the nature and business of this corporation, as limited and pointed out by their charter, strengthens Mr. Dennistoun's suggestion that they have none; though, under the 3rd section of their act, they are authorized under certain cases to hold lands.

We may draw a distinction between the whole sum claimed and the limited claim of £114 19s., both as respects the proof of demand, and as respects the possession by the defendants of that latter sum, at one time, at all events, as applicable to the plaintiff's demand, if that distinction will warrant our granting the writ of mandamus to pay the lesser sum.

Strictly speaking, it may be said this is not a trading corporation in the sense in which that term has been used in cases where the court have refused the writ,—as in Regina v. Bank of England (2 B. & A. 620), and Regina v. The London Insurance Co. (5 B. & A. 899). There cannot very well be profits in such a company as this, in which, except for the payment of current necessary expenses, none of the members advance anything, and there is no capital called in until a loss by fire has occurred; so that we could scarcely ground a refusal of the writ upon the authority of those and similar cases.

But it appears to us the case falls within another general rule—viz., that the court will only grant this writ when the party has no other specific legal remedy; and by the affidavits

filed, and on the argument, it was attempted to establish that the plaintiff stood precisely in that position, because the defendants had no real or personal property upon which an execution could attach.

It is a fallacy, as is pointed out by Lord Denman in Regina v. The Victoria Park Co. (1 Q. B. 288), to construe this rule as meaning that where the specific legal remedy exists, but is unproductive, the writ of mandamus should be granted,—because, in short, the execution may produce, or has produced, no fruits. "Here the plaintiff seeks only the payment of the debt and costs: for this an execution by Fi. Fa. is a perfect remedy in its nature; and if we were to issue the writ because in this particular case there is no corporation property seizable, it would be difficult in principle to refuse to issue it in any case where the sheriff should return nulla bona, whether the writ had issued against a corporation or an individual." This reasoning appears to us to furnish a conclusive answer to the former part of this rule.

As to the latter, we must take notice of the fact incorporating these mutual fire insurance companies; and bearing in mind its provisions, and the affidavit put in for the defendants, we do not see how the present directors could enforce payment by parties no longer members of the corporation as mutual insurers with the plaintiff, and whose deposit notes have been given up or cancelled, and especially when, as is stated in one of the affidavits filed for the plaintiff, the amount due on the award, the foundation of the present claim, has been accepted and paid by the former members to the former directors; and it would be unjust to the present directors, always remembering the peculiar character of the corporation, either to oblige them to pay over funds, if there be any in their hands, belonging to the non-members for their corporate purposes, or to place them in the situation of disobeying the writ. For these reasons we feel compelled to discharge this rule.

Rule discharged.

TIFFANY V. MCCUMBER.

Secondary evidence of deed—When admissible—Acknowledgement by married woman—Preemption.

Semble, that under the circumstances of this case secondary evidence of a deed in the chain of title was properly received; and the court refused to interfere, as the reception of such evidence was not objected to at the trial. Where the question was whether a deed by a married woman had been executed with the requisite formalities, and some evidence was given to shew that it had been acknowledged before a judge of this court—Held, that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time.

EJECTMENT for the east half of lot number 15, eleventh concession of Townsend.

The trial took place in March last, at Simcoe, before Draper, J. The land had been granted by the Crown on the 5th of November, 1802, to Elinor Walker, wife of John Walker, and daughter of John Muckle, a U. E. loyalist, and the principal matter in dispute was whether Elinor Walker and her husband had duly executed and acknowledged under 43 Geo. III. ch. 5, conveying the land to Henry Powell. He was called as a witness, and swore that he bought the land from Adam Dickie; who, forty-eight years ago, conveyed to him, and also handed him a conveyance from Mr. and Mrs. Walker to himself. Some objection was raised to the deed to Dickie, as not having been executed with the necessary formalities to pass the estate of a married woman, and Powell in consequence got a deed direct to himself from Mr. and Mrs. Walker, and gave up the other two deeds. He swore that an uncle of his, one Abraham Powell, advised this course, and drew the new deed, and was a subscribing witness to it; Abraham Powell was dead. The witness got this deed registered, and when he sold the land to one Banghart, handed the deed to him. He said he had it only three weeks in his possession; that there was some affidavit on this deed, made by Powell before a magistrate, and that he did not remember that anything else was endorsed on it; that this endorsement might have been on the memorial; that whatever was endorsed, so far as he could recollect; was for the purpose of getting the deed registered. Sarah Banghart swore that she knew that her husband owned the land; that she remembered the deed from Mr. Walker to Henry Powell; that her husband sold and conveyed the land to one Hutchinson (it appeared afterwards the purchaser's name was Warren and not Hutchinson), and gave the deed to Powell to him; that Warren was an alien, and came to her husband saying so, and that he could not hold land, and asked her husband to make a conveyance to Matthew Crooks: that Warren said he had mislaid the deed to Powell, but if he found it he would hand it to Crooks. A year or two after making the deed to Warren, her husband did execute a deed to Crooks, dated 30th of December, 1826. (This deed was put in and admitted.) The deed from Banghart to Warren was never registered, so it was given up. Mr. Crooks proved that he got this land as stated, Warren being indebted to him, and giving the land in part payment: that he went with him to Banghart and obtained the deed of 30th December, 1826, and that he never saw the deed to H. Powell. Walsh, the registrar, produced a certified copy of the memorial of a deed from John Walker and Elinor Walker to Henry Powell, dated 8th of May 1811, for the premises in question, registered 3rd of July, 1811. The memorial purported to be executed by both grantors, and was witnessed by Abraham Powell; who, as well one Muckle, was stated in the body of the memorial to have been a subscribing witness to the deed. He said he remembered seeing the deed in his office; when he first heard the grantors were denying its validity, he had a strong impression that there was on it a certificate signed by the late Sir Willian Campbell, who was formerly a puisne judge of the King's Bench: that he still had that impression though he could not positively swear to it; that if Mrs. Walker swore to the contrary he should think she had forgotten after so many years. This was the plaintiff's case, a chain of deeds from Henry Powelldown to the plaintiff being duly proved.

It was objected for defendant that nothing passed by Banghart's deed to Mr. Crooks, as Banghart previously conveyed to Warren. This was over-ruled, as the title was then a registered one, and the deed of Crooks was registered.

For the defence Elinor Walker was called. She denied having signed any deed, unless to the defendant. She said

she might have signed a paper before the deed to defendant, but was not sure; if so, it must have been to Powell: that she never acknowledged away her right until the deed to defendant: that there was another lot contained in the Crown patent, and that she was in court when she signed away her right to that other lot, but that was the only one. On crossexamination she said she knew old Abraham Powell very well; he came to her to get her to sign a deed: she might have signed the deed, but did not remember his giving her a new dress for signing it: she was sure she never signed it willingly: she stated that she was seventy-four years old. The defendant proved a deed to himself, from John and Elinor Walker—consideration, £75—for these premises, dated 21st of January, 1836; acknowledged before two justices of the peace on the 2nd of December, 1847; registered in March, 1853.

The question submitted to the jury was whether Elinor Walker made a sufficient conveyance to Henry Powell. The secondary evidence was left them as very strong as to the existence of such a deed, and its being executed by John and Elinor Walker, and they were told that the principal difficulty was as to the proof of the formalities required by 43 Geo. III. ch. 5, having been complied with: that the evidence of Henry Powell rather cast a doubt upon it, while that of Mr. Walsh went far to confirm it, and that, looking only at the plaintiff's case, there was evidence enough to warrant a verdict in his favor; against which there was the evidence of Mrs. Walker, who was very old and feeble, and her memory apparently not clear. The jury were recommended, if they were of opinion that Mr. Justice Campbell did certify Mrs. Walker's acknowledgment before him, to presume that it was indorsed within six months after the execution of the They found for the plaintiff.

In the following term *McMichael* obtained a rule nisi for a new trial, on the law and evidence, and for misdirection, the admission of improper evidence, and discovery of new evidence.

Thompson shewed cause, and filed affidavits in reply.

McMichael cited Regina v. Saffron Hill, 1 El. & Bl. 93; Doe Richards v. Lewis, 11 C. B. 1035.

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DRAPER, J.—Without adverting to the affidavits, the only question raised is whether the secondary evidence of the deed to Henry Powell was properly admitted. The evidence shewed that the deed was, about the year 1824, in the possession of one Warren, who had bought the property, but who stated he was an alien, and therefore could not hold it; that before the conveyance to Crooks, he had mislaid this deed, but if he found it he would deliver it to Crooks, and that it has not been seen since, and no account is given of Warren.

There is no ground for surmising that the deed is or ever has been in the plaintiff's possession, or that he is withholding it. The evidence of Mr. Crooks, who, in 1842, conveyed to the plaintiff, shews he never had it, and therefore could not have delivered it to the plaintiff. Thirty years have elapsed since the deed was seen; Warren, the last person proved to have it, stated that he had mislaid it, and though no particular enquiry after him or his papers was proved, yet no objection to the admission of the secondary evidence was made at the trial, or it might have been shewn that enquiry had been made in vain after him. The degree of diligence required in a search must depend on the peculiar circumstances of each case, and after such a lapse of years the same amount of search ought not to be required, for it would not be in many cases possible, as while the transaction was recent-Vide Brewster v. Sewell (3 B. & A. 303); Gully v. Bishop of Exeter (4 Bing. 298); Pardoe v. Price (13 M. &. W. 267); Regina v. Kenilworth (7 Q. B. 642). Upon this objection, taken for the first time after verdict, we think we should not interfere. The defendant, at the trial, evidently meant to rely on Mrs. Walker's evidence to rebut the plaintiff's case. As to the affidavits—the affidavits of Baldwin Walker would not justify us in granting a new trial, for if the defendant thought his testimony material he could have applied to put off the trial on account of his absence, and though Green's affidavit seems more material, it loses weight when, on the other side, a letter from Green himself is filed with the defendant's explanation on affidavit.

Burns, J.-I see no misdirection to the jury. The only link wanting in the chain of evidence to complete the paper title, was the deed from Elinor Walker and her husband to Powell. In the absence of that deed, a memorial of it, shewing that the deed was not only executed by her, but also that the memorial to register it was executed by her and her husband, was put in and proved. The question then, was whether she had parted with her estate in the manner required by law. In the absence of the deed that question was one of fact, whether Elinor Walker had acknowledged the deed before Mr. Justice Campbell. I think it was a proper direction to tell the jury, if they found it to be a fact that the deed had been so acknowledged, after the lapse of time, and the fact that Mr. Justice Campbell was a judge of the court of King's Bench, they should presume he gave such certificate within the time prescribed by law. The jury found the fact that Elinor Walker did acknowledge the deed before Mr. Justice Campbell, notwithstanding her evidence. I can find no fault with them for doing so, when it is apparent from her testimony that she had forgotten that she had executed a deed to Powell. No complaint was made at the trial that the deed to Powell was proved by secondary evidence; and if the defendant was content to go to the jury upon Mrs. Walker's testimony, respecting the fact whether that deed contained or did not contain an acknowledgment indorsed that she had parted with her estate in the land, we must hold him to it now. The affidavits do not contain any sufficient grounds for us to interfere, particularly as this action is not conclusive as to the title.

Rule discharged.

USBORNE V. GROVER.

Pleading-Nolle prosequi-Effect of.

The plaintiff declared in assumpsit on two counts, each on an agreement dated 16th Nov., 1843, to deliver timber. Breach, non-delivery. Defendant pleaded non-assumpsit to the whole declaration, and several other pleas to the first count, and to that count a nolle prosequi was entered.

Held, that it was sufficient at the trial for the plaintiff to produce one agreement corresponding with that declared on in the second count, and that it was not necessary for him to prove one corresponding with each count.

Assumpsit—First count, upon an agreement dated 16th of November, 1853, by which the defendant agreed to deliver a quantity of timber by a certain time; the breach complained of was, that the defendant did not deliver the timber—Second count, special, upon an agreement dated 16th of November, 1853, to deliver timber by a certain time, but that the defendant did not deliver the same. There were common counts also in the declaration.

Pleas—1st: Non-assumpsit, to the whole declaration. 2nd, to the first count: that the plaintiff did not, on the 10th January, 1854, or at any time, advance to the defendant the sum of £250 mentioned in the agreement, 3rd, to the first count: that the plaintiff was not ready to advance the £175 on the 10th of February, mentioned in the agreement. 4th, to the first count: That the plaintiff was not ready or willing to accept the timber, &c., in manner and form, &c. 5th, to the first count: that before any breach the agreement was by mutual consent rescinded. 6th, to the first count: That defendant broke the agreement by the leave and license of the plaintiff.

The plaintiff thereupon entered a nolle prosequi to the first count, stating that as to the causes of action in the first count, let the defendant be acquitted, and go thereof without day, not admitting the truth of the pleas in any way.

The case came on to be tried before Burns, J., at the last assizes at Belleville, with the nolle prosequi entered upon the record, and the plea of non-assumpsit only to the second and subsequent counts.

It was proved that on the 10th January, 1854, the plaintiff paid the defendant £250 on account of the contract for timber, the contract being admitted. The plaintiff proved that

none of the timber had been delivered; but he claimed only to have his money returned with interest. The defendant contended that he was entitled to have a verdict entered for him on the second count, unless the plaintiff proved two contracts corresponding with the counts of the declaration, for as the plantiff had entered a nolle prosequi to the first count, and only produced one contract, that one should be applied to the first count.

The plaintiff had a verdict for the £250 and interest, amounting in all to £271 5s.; and leave was reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that he was entitled to have it.

Eccles obtained a rule to enter-a verdict for defendant accordingly.

Hagarty, Q. C., shewed cause.

Burns, J., delivered the judgment of the court.

The prohibition respecting several counts in a declaration upon the same contract only affects the question of costs, and in that respect our rule differs from the rule adopted in England. In Amor v. Cuthbert (3 M. & Gr. 8), Chief Justice Tindal says, "the effect of a nolle prosequi, whether it extends to the whole or to part only of a cause of action, must be governed by the express terms of the entry-whether by such terms it is confined to any particular issue raised by the pleas, or is extended to the whole cause of action, as stated upon the declaration." At 1 Saund. 207 b, in the note, it is said-"So where there are several counts in the same declaration, and the defendant demurs to one count and pleads to issue to the other, the plaintiff may enter a nolle prosequi as to one count and proceed upon the other."-Lilly's Entries, 55, is quoted for this. The learned editor of Saunders says of Truman v. Hurst (1 T. R. 40), in which the court decided that an infant could not be charged upon an account stated, that upon the plea which was in bar to that count as well as others, the plaintiff might have set the matter right by entering a nolle prosequi to that count. - Vide Bertram v. Gordon (2 Marsh. 144, 6 Taunt. 444).

This point has been before the court in Leslie v. Davidson

(3 U. C. R. 459), and it was held that where the nolle proseaui did not involve the admission that plaintiff had no cause of action, the plaintiff could proceed upon the counts to which the nolle prosequi did not apply. If the declaration contains unnecessary counts, the defendant should apply to the court or a judge to strike out the improper counts. A contract may be declared upon, alleging in one count one breach and in another count a different breach; but surely the entry of a nolle prosequi upon the one, cannot deprive the plaintiff of his right of action as to the other; nor can it compel the plaintiff, in order to sustain his action, to prove that there were two contracts corresponding with both counts. All the plaintiff requires to do, is to prove a contract corresponding with the count upon which he claims remuneration. Suppose in this case there had been but one count, with several breaches, and to one breach a plea in bar, with something pleaded to the other breaches; it could not be contended the plaintiff would not be at liberty to enter a nolle prosegui as to the breach to which there was a plea in bar, and proceed with the others. The use of different counts not being prohibited, leaves the law the same as if there was one count with different breaches. The entry of a nolle prosequi to some breaches or counts, may possibly effect the merits of the plaintiff's claim upon other breaches or counts, but that would be a matter of evidence, not affecting the abstract right to take such a course. We think the rule should be discharged.

Rule discharged.

ALLAN V. ROGERS.

Overholding tenant-Mesne profits.

A landlord proceeding against an overholding tenant under 4 W. IV. ch. 1, sec. 53, cannot, under 14 & 15 Vic. ch. 114, sec. 12, recover mesne profits, the latter act applying only to actions of ejectment.

Semble, that the court will not entertain a motion to quash the inquisition for misconduct on the part of the commissioner, but that they have power

to hold him amenable for such misconduct, on an application independent of the proceedings between the landlord and tenant.

The plaintiff obtained a commission under 4 W. 1V. ch. 1, sec. 53, against the defendant as an overholding tenant, and the jury found that the defendant was tenant to plaintiff of the premises claimed for a term which had expired, and did

wrongfully "refuse to go out of possession, having no right or colour of right to remain in possession." The plaintiff had served a notice on the defendant, according to the form given in 14 & 15 Vic. ch. 114, sec. 12, and he claimed under that section to be entitled to mesne profits or damages for the overholding. The jury allowed him £6 5s. for damages by reason of such detention.

Dempsey now moved for a rule approving and confirming the finding of the jury on the above matter, and to issue a precept to the sheriff pursuant to the stat. 4 W. IV ch. 1.

James Boulton, for the tenant, also applied for a rule nisi to quash the inquisition, upon affidavits alleging misconduct on the part of the commissioner.

DRAPER, J. delivered the judgment of the court.

We think the plaintiff is entitled to a precept commanding the sheriff to place him, the landlord, in possession, and also to a writ to the sheriff commanding him to levy of the tenant's goods and chattels costs to be taxed, pursuant to the table approved by the judges 14th January, 1839.—Draper's Rules, 26, 27.

As to the damages, in our opinion the landlord is not entitled to recover them. The statute 4 W. IV. ch. 1, which gives the summary remedy, gives no right to damages. The commissioner is not authorized by the commission to summon a jury to enquire concerning damages, and the jurors oath is silent respecting them.

The words of the twelfth section of the statute 14 & 15 Vic. ch. 114, are certainly very general—"that in all cases wherein a jury shall be empanelled to try any suit brought to recover possession of any property, the jury shall also be sworn to assess any damages to which the plaintiff may be entitled for the use, occupation, or enjoyment of the premises in dispute by the party or parties defending the suit, and any damage, waste, or spoil occasioned to such premises by such party or parties; and the jury shall assess such damages as may appear just according to the evidence," provided that ainotice of intention to claim substantial damages according to a prescribed form be given, "and that none but nominal damages shall be assessed unless such notice be given."

We are of opinion that this section applies only to actions of ejectment. The whole frame of the act, of which this section is a part, tends to this conclusion.

Even if there were other actions than ejectments to which this twelfth section could apply, it could only, we think, be to those wherein the plaintiff, if entitled to a verdict, would also have a strict right to nominal damages, a right which the 4 W. IV. ch. 1, sec 53 et seq., does not give. And if it were otherwise as to this, and the twelfth section of the ejectment act applied to the proceedings against an overholding tenant, still the jury were not sworn to assess them, and therefore under that section could not lawfully do so.

With regard to Mr. Boulton's motion to quash the inquisition, to which I think he finally reduced his application, we are of opinion that his affidavits shew no sufficient ground to sustain it. We doubt greatly, though it is unnecessary to decide the point, whether the court would entertain such a motion under any circumstances, for it seems not contemplated that this expeditious and unexpensive remedy should be subject to this species of proceeding in the superior court. The necessity for coming to the court or a judge for a precept in the nature of an execution, and the power reserved to the court to reverse the decision of a single judge, appear to me the only check on or method of appeal from the proceedings on the commission and inquisition, and these are sufficient to prevent the tenant being improperly ousted. If the commissioner misconducts himself, it must be by a different sort of application that the court will consider whether his conduct calls for inquiry and for censure or punishment, assuming that the power exists, as I at present think it does, to hold him amenable for an abuse of the powers conferred on him by the commission. But such an application should be quite independent of the proceedings between the landlord and the (alleged) overholding tenant.

AITKIN V. MOODY, SHERIFF.

Case for false return—Estoppel—Acceptance of return by plaintiff.

A Fi. Fa. at the suit of one G. against R. was placed in the sheriff's hands, with instructions not to enforce it until further orders, unless other executions should come in. No further instructions were received, and the plaintiff subsequently put in an execution against R. with directions to proceed at once. The sheriff levied on both writs, and paid over the money to G. who had indemnified him. The plaintiff then obtained a return to his writ of nulla bona, which the sheriff said was the only return he would make, and sued out a Ca. Sa., on which R. was arrested.

Held, that the plaintiff by taking such return had not precluded himself from proceeding against the sheriff, and that he could maintain an action on

the case for false return.

CASE for a false return, against the defendant a sheriff of Hastings.

The first count set out a judgment obtained by the plaintiff against one Alex. M. Ross, and alleged that on the 23rd of May, 1854, a Fi. Fa. was sued out, indorsed to levy £389 16s. 3d. besides interest, £3 10s. 8d. costs, and 18s. 9d. for the writ and sheriff's fees, which writ was placed in the defendant's hands: that Ross had goods and chattels in the defendant's county, out of which the defendant might have levied the amount, and of which he had notice, yet he disregarded his duty, and falsely returned that Ross had no goods.

The second count alleged that the defendant seized and took the goods, and levied the moneys indorsed on the writ, yet the defendant had not the moneys according to the exigency of the writ, nor hath he paid the plaintiff the amount, and afterwards falsely returned that Ross had no goods.

Pleas—First. Nul tiel record of the judgment in the first count mentioned Second, to first count, not guilty. Third, to the first count, that Ross had no goods out of which the defendant could make the amount. Fourth, to the first count, that defendant had no notice of any goods of Ross. Fifth, to the first count, that the return of nulla bona was made at the request of the plaintiff. Sixth, to the first count, that the return of nulla bona was made at the request of plaintiff, who accepted the same with a full knowledge of the facts. Seventh, to the first count, that the plaintiff ought not to be admitted to say the defendant falsely returned the said writ, because the plaintiff requested the defendant to return nulla bona,

and that the plaintiff accepted the same with knowledge that the same was false. Eighth, to the first count, that the plaintiff ought not to be admitted to say the defendant falsely returned the said writ, because the plaintiff at the time of his return, specially requested the defendant to make such return, and the plaintiff accepted the same, and before the commencement of this suit, on the 15th July, 1854, sued out a Ca. Sa against Ross, and delivered the same to this defendant, upon which writ, the defendant arrested Ross, and still keeps him in custody upon the said writ; and therefore the plaintiff ought not to be admitted to say the return is false. Ninth, to the first count, that one Gillespie on the sixth April, 1854, sued out a writ against the goods of Ross, and placed the same in the defendant's hands, and thereupon the defendant seized Ross's goods, and sold the same for £200, being less than the amountindorsed on Gillespie's Fi. Fa., and the defendant paid over the same to Gillespie. Tenth, to the first count, that Ross had not any goods in the defendant's county out of which he could make the amount of the plaintiff's writ. Eleventh, to the first count, that the plaintiff's judgment was fraudulent, Twelfth and Thirteenth pleas to the second count, same as first and second to first count. Fourteenth, to the second count, that defendant did not seize any goods of Ross. Fifteenth, to second count, that there were no goods of Ross in the defendant's county. Sixteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth, to the second count, the same as the sixth, seventh, eighth, ninth, and eleventh pleas to the first count.

The replication joined issues on the pleas offering issues to the country, and to all the others replied *de injuriâ*, upon which issue was taken.

At the trial, before Burns, J., at the last assizes at Belleville, the facts appeared to be these—On the sixth of April, 1854, a Fi. Fa. was sued out by Gillespie against Ross, and placed in the sheriff's office. Written instructions were given to the attorney at the time the writ was put in the sheriff's office, in these words—"Gillespie v. Ross not to be enforced until further orders, unless other executions are placed in sheriff's hands: Thomas A. Lazier;" and at the foot were these words, "to be kept quiet and a security against other executions,"

which were scratched out after the sheriff's clerk had read the paper. No fresh instructions were received by the sheriff. On the 22nd of May the plaintiff's writ was placed in the sheriff's hands with instructions to proceed at once. sheriff then levied on Ross's goods on both writs, and sold and realized £200, which he paid over to Gillespie on the 10th of June, 1854. The defendant was notified on the 31st of May, not to pay the money over to Gillespie, for that the plaintiff claimed the amount, but Gillespie having on the 7th of June indemnified the defendant for so doing, the defendant paid over the amount to him. Ross had at this time either absconded, or there was reason to believe that he had, but he returned on the night of the 15th of July, 1854, to Belleville, and the plaintiff hearing of it, and that Ross intended leaving again early the next morning, obtained a return to his writ, and thereupon sued out a Ca. Sa. defendant was himself examined, and stated that he was not deceived in any way in making the return of nulla bona to the plaintiff's writ: that it was the only return he intended to or could make; and that the return was made to enable the plaintiff to sue out a Ca. Sa. Ross was arrested upon the Ca. Sa., and, after being in close custody for some time, was admitted to the limits, and at the time of this trial was still on the limits at the plaintiff's suit.

It was contended that if the plaintiff could maintain any action, it should have been an action for money had and received to the plaintiff's use, and not an action for a false return.

This objection was overruled, and the learned judge stated his opinion to be, that the plaintiff's writ had priority over Gillespie's; and thereupon the plaintiff had a verdict for £212, being the amount levied, and £12 for interest; and leave was reserved to the defendant to move the court to enter a verdict for him on any of the pleas, if the court should be of opinion that the evidence sustained a defence upon them.

Richards obtained a rule nisi to set aside the verdict and enter a verdict for the defendant, pursuant to the leave reserved, or for a new trial, the verdict being contrary to law and evidence. He contended that the action should have been for

money had and received to the plaintiff's use, and not an action for a false return, and that the evidence supported and warranted a verdict being entered for the defendant on the fifth, sixth, seventh, and eighth pleas to the first count, and the sixteenth, seventeenth, and eighteenth pleas to the second count. He cited Baysv. Ruttan, 6 U. C.R., 263; Fraserv. Bacon, 2 U. C.R. 132; Cohen v. Cunningham, 8 T. R. 123; 4 P. & D. 112. Wallbridge shewed cause.

DRAPER, J .-- The decision of Lord Ellenborough in Wordall v. Smith (1 Champ. 332) is almost precisely in point. action was against the sheriff of Middlesex for a false return to a writ of Fi. Fa. The Fi. Fa. was sued out in December, 1807, and returned nulla bona. In February following, the execution debtor being surrendered in discharge of his bail in another action, was charged in execution by the plaintiff Woodall. In was objected that the action could not be supported, as the plaintiff had already obtained satisfaction, to which Lord Ellenborough replied, "the plaintiff's cause of action accrued upon the false return to the writ of Fi. Fa. and cannot be defeated by anything which has since taken place between him and another person." Beynon v. Garrat (1 C. & P. 154) indeed establishes a contrary principle; but the court in Holmes v. Clifton (10 A. & E. 673), said that case, if correctly reported, could not be sustained.

Miller v. Thomas, in our own court (11 U. C. R. 302) is not conclusive in the defendant's favor, because that proceeded only on the formal sufficiency of the plea as an estoppel in pais. Here the pleas are traversed, and the question is whether the verdict rendered by the jury for the plaintiff is right upon the evidence, and whether they were warranted in law in the conclusion.

It appears to me that when the sheriff admits, as he did, when called as a witness in the cause, that he had paid over the proceeds of the goods sold, to Gillespie on his execution (having got indemnity from him), before he made the return now complained against, and that he intended to make this return and could have made no other, the plaintiff cannot be said to have accepted it in that sense in which the term must

be understood to constitute a defence according to the case of Miller v. Thomas. Acceptance must be taken to be an act beyond the mere receiving such return, but must be coupled with the preceding statement in the plea, that he also requested it-in other words, induced the sheriff to make a false return for some purpose of his (the plaintiff's) own. Now here it appears that the request of the plaintiff did not cause or produce the false return—the plaintiff would gladly have received a return of money made, which the sheriff clearly ought to have made under the circumstances, and all that really appears is this, that he took this return knowing it was false, but unable to get any other. Suppose, after getting it, he had made no other use of it than to make it the foundation of a suitagainst the sheriff—he might request the sheriff to return the writ, might do so with a full knowledge of all the circumstances that the sheriff must and would return nulla bona, might know such return was false, and, knowing what the sheriff had done, might request the very return which alone the sheriff would make—Bloomfield's case, (5 Co. 86). I do not think all this put together would bar the plaintiff's action, and I do not think the facts proved amount to more. If so, no question remains but whether having so got the return, his taking out a Ca. Sa. against the debtor, bars this action against the sheriff, and Woodall and Smith is directly to that point.

I think therefore the rule should be discharged, for I do not think the evidence entitles the defendant to a verdict on any issue which would defeat the plaintiff's recovery.

Burns, J.—'I he form of action against the defendant is quite correct. If the return had been "money made," then the proper form would have been for money had and received; but when the return is that there were no goods, the plaintiff may, notwithstanding that in point of fact the sheriff may have received the money, still maintain his action for the misfeasance as framed in case. If that were not so, then in a case where the sheriff returned that part of the money was made (which was not paid over), and as to the residue that the debtor had no more goods, the plaintiff might be driven to two actions; or in any case where the sheriff returned nulla

shona, the form of action in case might be defeated, by it being shewn at the trial that in truth the sheriff had the money in hand. Besides these considerations, the plaintiff cannot with any certainty, know what sum precisely the sheriff has made or should have made from the goods of the execution debtor. In the present case the plaintiff contended that there were goods of the debtor beyond what the sheriff sold, and gave some evidence of it; but, as it appeared to me, the action was in truth brought to test the plaintiff's right to the £200 made; the jury should give credit to the sheriff for having faithfully discharged his duty, unless indeed the plaintiff meant seriously to contest that there were other goods liable to be sold under his execution, but finally the plaintiff gave that part up.

With regard to the defence set up by the fifth, sixth, and seventh pleas to the first count, and the sixteenth and seventeenth pleas to the second count, no question arises upon the sufficiency of the defence set up by the pleadings, but the question is whether the evidence is sufficient to sustain the defence. Holmes v. Clifton (10 A. & E. 673) shews that an execution creditor, by receiving the money levied, does not preclude himself from complaining against the sheriff that he has made a false return. The evidence in the case before us. shews that before the sheriff returned the plaintiff's writ he was aware that the plaintiff demanded the money from him, and he had paid over the money to the other creditor. He was not induced to alter his position by any act of the plaintiff; he had first elected to put himself in that position, and then the plaintiff acted upon that. Under such circumstances we cannot hold that the plaintiff waived his right to complain against the sheriff, by accepting the only return the sheriff said he intended to or could make.

Then the next question is, whether the eighth plea to the first count, and eighteenth to the second count, afford any defence to this action. The plaintiff on the return of nulla bona, sued out a Ca. Sa. against the debtor, and indorsed the writ for the full amount of the judgment, and under this writ the debtor is now in custody. It is contended that taking the body of the debtor in execution, and keeping him in custody, is such a satisfaction of the debt as to prevent the sheriff

from being sued in an action for a false return to the Fi. Fa. I do not think the issuing of the Ca. Sa. and arrest of the debtor has the effect of becoming such a satisfaction as prevents the plaintiff from pursuing any remedy he may have. Where the plaintiff may have a demand existing against several persons, notwithstanding that one of such persons may be in execution for the debt or damages, the plaintiff may pursue his remedy against the others.—See Blumfield's case (5 Co. 86). There it is said, "note also a difference between an execution final, as where the sheriff levies the money of the defendant's goods, or extends his lands and delivers them to the plaintiff, for that the party accepts in satisfaction, and that is the end of the suit, and all that the King's writ commands to be done; and between an execution with a quousque, &c., tending to an end, and which is not final, as in the case of a capias ad satisfaciendum, &c., it is not final, but his body is to be taken to the intent and purpose that he shall satisfy the party, and his imprisonment is not absolute, but quousque the defendant shall satisfy the party; but execution final is when the party is satisfied."-See Foster v. Jackson (Hob. 59). If the taking of the body be no satisfaction of the debt as regards third persons, who may be liable also for the same debt, I do not see how doing so is to have the operation of barring the plaintiff's remedy against the sheriff for a breach of duty in respect to a previous matter which caused the plaintiff an injury. Wordall v. Smith (1 Camp. 332) and Pitcher v. King (9 A. & E. 288) seem to me sufficient authorities to shew the plaintiff is not precluded from complaining against the sheriff.

It is not material to the consideration of this case, to enquire whether the sheriff, in case he is made to pay, can have any remedy over against any other person. Undoubtedly as regards this plaintiff he has been a wrong-doer, as the case of Hunt v. Hooper (12 M. & W. 664) establishes, Gillespie's writ was not delivered to be executed, as it should have been, in order that it might take precedence of the plaintiff's writ, which was delivered to be executed. Whether the execution debtor can claim any consideration from the court, by reason of the sheriff being made to pay a sum of money in consequence of

the sheriff's breach of duty, is not material either to consider in this action. The question at present is whether the plaintiff has precluded himself from complaining against the sheriff, and I must say I do not think he has. If he has not, then is the sheriff liable to compensate the plaintiff to the extent of the money he should have paid over to him instead of to Gillespie, without reference to the position of the execution debtor? So far as respects the plaintiff's right in this action is concerned, I am of opinion he is entitled.

Rule discharged.

JEASLER V. BELL ET AL.

Grand Trunk Railway—Entry on land before filing plan—14 § 15 Vic ch. 51, sec. 10, sub-sec. 4.

An award made under the 14 & 15 Vic. ch. 51, will not cover injuries committed by the company in entering upon lands before filing their map and plan, when they had no legal right to enter.

TRESPASS quare clausum fregit to lot 10 in the 1st concession of the Township of South Easthope, and destroying crops, &c.

Special plea in bar, that the defendants, under the authority of the Grand Trunk Railway Company, entered for the purposes of making and constructing the Railway, and (describing a piece of land by abuttals and boundaries) that the company filed their maps and plans, and gave a month's notice, after offering £20 as compensation; and thereupon an arbitration was had between the company and the plaintiff; and the arbitrators, on the 15th of February, 1855, made their award, and awarded to the plaintiff the sum of £20, as and for the purchase money and compensation for the interest of the said plaintiff in the land so intended to be taken, and in the plan particularly described, and for all damages sustained and to be sustained by the plaintiff by reason of the severing of the said lands from the other lands of the plaintiff, and the otherwise injuriously affecting such other lands and premises, by the exercise of the said company of the powers contained in the act.

The plaintiff replied to this plea by a new assignment, to which Not Guilty only was pleaded.

At the trial, before Draper, J., at Woodstock, it appeared that the trespasses for which the plaintiff sought compensation were committed before the company filed their plans and maps. It was proved that such maps and plans, describing the piece of land which the company proposed to take from the plaintiff, were filed in the office of the clerk of the peace on the 29th of June, 1854, and that the defendants entered upon the plaintiff's lot in May, 1854, and threw down his fence, and began work on the line of railway. They continued their work in May and June, and exposed the plaintiff's crops, which were injured by cattle and hogs, on other parts of his land than the piece which had been selected for the track. The learned Judge held that these matters were not covered by the award, being done before the company had acquired any right; and the plaintiff had a verdict for £31 17s. 6d.

D. G. Miller moved for a rule nisi to set aside the verdict, on the law and evidence, for misdirection, and reception of improper evidence.

Cur. adv. vult.

BURNS, J., delivered the judgment of the court.

We have examined the Railway Clauses Consolidation Act, 14 & Vic., ch. 51, and are of opinion that the plaintiff is entitled to recover. The fourth sub-section of section 10 enacts, that until the original map or plan shall have been deposited the execution of the railway shall not be proceeded with. The company can do nothing towards entering or assuming the lands until one month after the deposit of the map or plan, and it is after that period when arbitration can be compelled. In this case the award is quite specific of what the arbitrators intended should be covered by the £20, and it is not pretended that the award covers the act committed by the defendants, unless it be by implication of law. It is impossible to hold that the award between the company and the plaintiff can justify the defendants for acts committed by them before the company had any legal right to enter upon the plaintiff's land or do any act in the actual construction of the road under the powers vested in the company. There will be no rule.

Brown v. Sheppard.

Medical evidence-Ground for new trial.

It is not admissible to ask medical witnesses on cross examination what books they consider the best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion

The fact of counsel having yielded to the advice of others and omitted to call witnesses, is no ground for a new trial; nor is the fact that one of the jurors, before the trial, had expressed an opinion against the defen-

dant, which the defendant was aware of.

TRESPASS for the seduction of the plaintiff's daughter.

At the trial, before Draper, J., at Woodstock, the plaintiff's daughter proved the seduction to have taken place on the 17th of January, 1854, and the birth of a still-born child took place on the 17th of December, 1854. It was proved by the young woman, and corroborated by other witnesses, that she was in pain arising from her pregnancy about the 22nd of October, and from thence up to the birth of the child, and also that her breasts filled out some five or six weeks prior to the birth. The medical attendant proved that he had been notified in the end of October or beginning of November that his services would be required. He visited her on the 9th of December, and found her complaining of pain in the lower part of her abdomen, and again visited her on the 14th of December, when he found the pains were severe. On the 17th of December the child was born dead, but did not appear, as the physician stated, to have been long so.

The defendant's counsel proposed to ask, in cross-examination of the medical witnesses, what medical works they considered best, as treating upon the subject uteri gestatio, and proposed to adduce and read such books to the jury. This the learned judge rejected; allowing the counsel to ask, however, whether such works influenced the witnesses in the opinions arrived at.

A verdict was found for the plaintiff, and £25 damages.

D. G. Miller moved for a new trial on the law and evidence, and for misdirection, in the learned judge not allowing the defendant's counsel to go to the extent he desired at Nisi Prius. He also moved upon an affidavit, stating that he, being counsel for the defendant, intended to call witnesses on the part of the defendant in respect to medical opinion, but that he was advised not to do so, and he believed his not doing so

prejudiced the defence; and also stating that his client told him, some two days before the trial came on, that one of the jurors had expressed an opinion against the defendant, and he believed that person was upon the jury. He cited Collier v. Simpson, 5 C. & P. 73; Earl Nelson v. Lord Bridport, 8 Beav. 527; Ramadge v. Ryan, 9 Bing. 333; Allum v. Boultbee, 9 Ex. 742.

BURNS, J., delivered the judgment of the court.

We have examined the evidence, and cannot say that the verdict is contrary to law or evidence. The question was simply whether the jury should believe the statement of the girl, that the defendant was her seducer; and whether, upon the opinions of the medical witnesses, they could in this particular instance believe that the period of gestation was protracted to eleven months. Upon examination of the subject, whether the learned judge was right in rejecting medical works, we have no doubt he was quite right. Chief Justice Tindal draws a distinction between admitting a book containing foreign law to be proved, and read to prove the law, and a book treating upon skill and science and the opinions of different persons upon the laws of nature. The distinction is obvious upon reflection: the object of the first is, to prove an existing fact which is to govern certain things and actions, and the second is, for the purpose of offering opinions upon which the fact is to be deduced. The rule of law with regard to the latter is, that the opinions which are to be received, upon which the jury is to deduce a certain fact, must be so given as to be subject to examination and cross-examination before the court and jury. Now it is obvious, if books upon skill and science are to be made evidence of themselves, the protection a person has of shewing by an examination of the person advancing an opinion that it is improperly arrived at, is quite destroyed. See Collier v. Simpson (5 C. & P. 73).

With respect to the grounds alleged in the affidavit of the defendant's counsel, we must say the first—namely, that he yielded to the advice of his own witnesses and of some barristers not concerned in the cause, to call no witnesses—is a novel ground for applying for a new trial. If his judgment was

not to be relied upon in the conduct of the defence, his client should have employed other counsel; if it was to be relied upon, then he exercised it, and it is rather late to come now and tell us he exercised it injudiciously. The second ground-namely, that a person was upon the jury who had previously expressed an opinion-comes now too late after verdict, when the defendant had the power of objecting to that juror without assigning any cause, and did not exercise it. With respect to both grounds, the defendant has chosen to risk his defence upon the plaintiff's evidence, and without objecting to the juror, when it was in his power to have objected to the juror and to have called witnesses upon the point of medical science: and having exercised and depended upon his own judgment in both matters, it is quite impossible that we should ask the plaintiff to permit him to better his defence upon points entirely within his own control. rule must be refused.

Rule refused.

John McKenzie and Alexander McDonell as Executors of the last will and testament of Duncan Grant, deceased, and John Grant, v. Ronald Grant.

Will-Construction of-Power of Executors.

Testator by his will gave to his son John £25, "with such other provision as my executor may deem proper, and his own conduct may deserve." He then devised to his son Ronald certain lands in fee, "except and in so far as any reservation may be made by my executors in favor of mv son John." Held, that the executors took no estate in the lands devised to Ronald, but that under the reservation they had power to convey to John a life estate in root of them.

Semble, that they could not have conveyed the whole of such lands to John

for life, or any part in fee.

EJECTMENT for the west half of 20 in the second concession, south side of the River aux Raisins, in the township of Charlottenburgh.

A verdict was taken for the plaintiffs, subject to the opinion of the court, whether the executors took such an estate under the will as would entitle them to convey to John Grant, the other plaintiff. If the court should be of opinion that the executors took such an estate, the verdict for the plaintiff to stand.

It was admitted by the plaintiff that Ronald Grant, the defendant, had offered to support John Grant, the plaintiff, and his sister Grace.

Duncan Grant made his last will, dated 23rd of March, 1836, and registered on the 17th of January, 1852, and thereby gave to his wife the farm on which he resided, viz., the west half of No. 20 and the east half of 21, second concession, south side of the River aux Raisins, to be possessed by her during her natural life, subject to the direction and control of his executors, and on condition that his unmarried daughter should be maintained by his wife, and that his grand-daughter, then residing with him, should be maintained in like manner till of age. He gave to his daughters Grace, Flora, and Catherine, £25 each, to be paid out of the proceeds of lot No. 1, in the seventh concession of Kenyon, and No. 22, in the seventeenth concession of Lancaster, otherwise eighth concession of Lochiel. He gave to his son John £25, with "such other provision as my executors may deem proper and his own conduct may deserve." He gave to his son Ronald, in fee, "except and in so far as any reservation may be made by my executors in favor of my son John," the west half of No. 20, and the east half of 21, upon the express condition that he should provide for testator's unmarried daughters, and grandchild, in the manner above stated.

By indenture dated 6th of July, 1853, made between the executors of the deceased Duncan Grant of the one part, and John Grant of the other part-reciting the appointment of the executors, and that testator did give to John Grant £25, with such other provisions, &c., as in the will, and that testator did give to his son Ronald, except and in so far as any reservation, &c. (in the words of the will)—the executors, in pursuance of the authority in them vested by the will, and in consideration of 5s., did bargain, sell, and release to John Grant the west half of No. 20, second concession of Charlottenburgh, in the said will and testament mentioned: Habendum for life; with a declaration by the executors that the indenture was executed, and the lands were bargained, sold, and released, as and by way of appointment and reservation to John Grant, and by virtue of the said will; and that the said lands, and the bargaining, selling, and releasing thereof, were, and were intended to be, the reservation in and out of the said west half of No. 20, and the east half of No. 21, second concession, south side of the River aux Raisins, in the said will mentioned made by the executors in favor of John Grant in pursuance of the said will, and that, subject to the said reservation and apportionment, Ronald Grant was to take the lands under the devise. Registered 11th of July, 1853.

Van Koughnet, Q.C., for the plaintiffs-Richards, contra.

DRAPER, J., delivered the judgment of the court.

The testator clearly gives a fee simple to Ronald in the west half of No. 20, and the east half of No. 21, upon the express condition that he shall provide for testator's unmarried daughters, and grandchild, as follows—that the unmarried daughters shall be maintained, and grandchild be maintained until of age. But this gift to Ronald has this exception annexed to it, "except and in so far as any reservation may be made by my executors in favour of my son John." In a preceding part of the will he gives his son John £25 "with such other provisions as my executors may deem proper, and his own conduct may deserve."

It is quite clear the executors took no estate; the power to them was simply collateral—Edwards v. Slater (Hard. 410). The widow of testator had a life estate, subject to the same charge respecting the unmarried daughters and the grand-daughter as is mentioned in the devise to Ronald. The case does not state whether she be living or no; if living it would be necessary to decide whether the power to the executors overreached her life estate. From the argument we gathered however that she was dead, and our judgment is predicated so far on that assumption.

The questions then are—1. Whether the executors took any power of appointment under the will, and if so, to what extent. 2. Whether the indenture of the 26th of July, 1853, was a proper execution of that power.

1st. The legacy to John of £25 is coupled with these words, "with such other provision as my executors may deem proper and his own couduct may deserve." Then the devise of the land to Ronald is, "except and in so far as any reservation may be made by my executors in favour of myson John."

We think these latter words do give a power by implication

to the executors to make a provision for John out of the lands devised to Ronald, and that the term reservation indicates that such provision is to be something within or less than the estate devised to Ronald. We are not called upon to decide whether the power extends to authorize their giving any part of the lands in fee to John. My own present impression is that it does not, for many reasons, which it is not necessary now to discuss.

The authority given to the executors falls strictly within the definition of a power as given by Buller, J., in Goodhill v. Brigham (1 B. & P. 197), "an authority enabling one person to dispose of the interest which is vested in another." That the testator desired they should have a power to make further provision for John is plain enough, and it is equally plain it was the testator's intention that it might be made by reservation out of the estate devised to Ronald. In giving to John therefore a life estate in part of the land, we are of opinion they did not exceed the authority given to them by the words accompanying the devise to Ronald, without which words they would have had no power over the realty at all.

Whether the land—i.e., the two lots devised to Ronald—may be chargeable with the maintenance of testator's unmarried daughters, or whether the charge be personal upon Ronald, it is not necessary for the purpose of the case to enquire.

We are of opinion that the executors took no estate in the land, but that the power given to them is well executed by the conveyance they have made, and that therefore the postea should be delivered to the plaintiff John Grant.

WANZER V. STOUTENBURGH ET AL.

Promissory note-Pleading-Folse pleas.

To an action on a promissory note, payable to K. or bearer, by plaintiff as bearer against the makers, the defendants pleaded that after the making of the note, and before it became due, the plaintiff, for a valuable consideration, delivered it to certain persons to defendants unknown, who lost the said note, and the same then came into the hands of the plaintiff by finding, and not by assignment or delivery for consideration, and that the said persons unknown were, and still are entitled to said note, and the money due thereon.

Held, that the plea shewed a good defence.

See the remarks of the court as to the practice of pleading false pleas.

Assumpsit on a promissory note, dated 28th of June, 1853, made by defendants in favor of one John McKercher, or bearer, for £100, payable on the 1st of January, 1855, at the store of one of the defendants in Reach; Averment, that the plaintiff is the lawful bearer, and of presentment. Plea, that after the making of the note, and before it became due, to wit, on the 28th of June, 1853, the plaintiff for a valuable consideration delivered the note to certain persons unknown to defendant, and such person afterwards, on, &c., lost the note, which came into the possession of the plaintiff by finding, and not by assignment or delivery for consideration, and the persons unknown were at the commencement of this suit, and still are entitled to the note, and to receive the money due thereon.

Demurrer—That the facts pleaded, if true, form no defence. Freeland for the demurrer. M. C. Cameron contra.

In addition to the cases cited in the judgment, Chitty on Bills, 265, 267; Hansard v. Robinson, 7 B. & C. 90; Lane v. Mullins, 1 Dowl. N. S. 562; Story on P. N. secs. 244, 446.

DRAPER, J., delivered the judgment of the court.

Frazer v. Welch (8 M. & W. 629), which was cited on the argument, certainly countenances this plea. There the plea was that the plaintiff had endorsed the bill declared on for value to certain persons unknown, and defendants became liable to pay them as holders. Replication—That the said persons unknown were not holders modo et formâ. The court sustained the replication on demurrer. Emmett v. Tottenham (8 Ex. 884) also cited for defendants, decides that a plaintiff must either have an interest in a bill or possession of it, to enable him to maintain an action on it.

I am afraid this is a good plea, though it bears strong marks of being a false one. Although a party suing on a note of which he is the rightful owner cannot, if the making be denied, recover without producing it at the trial, if it is in existence, yet that does not establish that a party in whose possession a note is, but who is admitted or shewn to have no right whatever to it, can recover upon it; and yet that is the effect of the present demurrer.

The plea certainly may be true, but if otherwise it is an abuse of the right to plead to frame ingeniously drawn falsehoods to delay a party recovering an honest debt, and to try and defeat justice. I observe there are authorities in England shewing that under certain circumstances the court will strike out a plea, on an uncontradicted affidavit of its falsehood; whether that depends on any new act or practice I do not at this moment remember.

Certainly if the plaintiff or defendant were put to unnecessary expense by his attorney pleading without instructions pleas that are utterly unfounded, the court would, on a proper application, grant relief. It might in some cases be a question whether they would consider they had done enough in merely making the attorney pay costs. We are induced to make this observation from observing as many as twenty pleas in some records we have recently looked at, three-fourths of which were utterly unnecessary for the matter really in dispute, besides being, as the verdict shewed, wholly untrue.

Judgment for defendant on demurrer.

eggger-post-mark-to-tradition/resum.

CLARK V. RING.

Pleading-Accord and satisfaction by agreement.

Case for an injury to plaintiff 's reversionary interest in land leased by him to defendant. Plea, that on. &c., it was agreed between plaintiff and defendant, that if defendant would agree to pay the plaintiff the sum of £62.5s, for the use and occupation of certain premises of the plaintiff for one year, the plaintiff would accept such agreement in full satisfaction and discharge of the grievances complained of: that in pursuance of such agreement defendant, on, &c., agreed to pay the plaintiff the said sum of £62.15s., and plaintiff then accepted the said agreement in such full satisfaction and discharge as aforesaid.

Held, a good plea of accord and satisfaction.

The declaration was in case for an injury to the plaintiff's reversionary interest committed by defendant, the tenant to

the plaintiff of the premises on which the injury was charged. Plea-That after the committing of the grievances, and before the commencement of this suit, to wit, on the 1st of August, 1854, it was agreed between the plaintiff and defendant, that if the defendant would undertake and agree to pay to the plaintiff for the use and occupation by defendant for one year of certain premises of the plaintiff, situated &c., then in the occupation of defendant as a store, the sum of £62 15s., to be paid quarterly, with the taxes thereon, the year to commence, to wit, from the 9th day of September, 1853, the plaintiff would accept such undertaking and agreement in full satisfaction and discharge of the said grievances. Averment-That in pursuance of the agreement the defendant did, after the making thereof, and before the commencement of this suit, to wit, on the 1st of August, 1854, undertake and agree with the plaintiff to pay him in quarterly payments for the use and occupation of the premises in this plea mentioned the said sum of £62 15s., together with the taxes, for the term of one year, to be computed as aforesaid; and the plaintiff then accepted the said undertaking and agreement of the defendant in such full satisfaction and discharge as aforesaid: verification.

Demurrer—That the plea only shews an accord, and is bad in attempting to answer a vested right of action without averring performance, being an attempt to substitute another right of action merely equivalent to that which the plaintiff had before; that it is not shewn that defendant had used or occupied the premises, or paid the sum of £62 15s., or that defendant was bound to carry out such agreement.

Eccles for the demurrer. Springer contra.

Evans v. Powis, 1 Ex. 601; Jones v. Sawkins, 5 C. B. 142; Bainbridge v. Lax, 9 Q. B. 819; Gifford v. Whittaker, 6 Q. B. 249 Flockton v. Hall, 14 Q. B. 380; S. C. in Error, 16 Q. B. 1039; 1 Sm. L. C. 150: were cited in the argument.

DRAPER, J., delivered the judgment of the court.

The principle on which cases like the present turn is thus stated in the note to 1 Smith's L. C. 150: "If the promise

be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance." In the present plea the making of the agreement is averred to have been the foundation of the satisfaction, not the performance of it, and then it is expressly averred that the plaintiff accepted the agreement in full satisfaction of the causes of action stated in the declaration. But if this be so, nothing remains incomplete of what the defendant agreed to give and the plaintiff to accept in satisfaction, and then the first objection taken to the plea fails.

It is well settled, as we understand the law, that an agreement may be accepted in satisfaction of a vested right of action. In Com. Dig. "Accord," B. 4, it is said, "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance." And this principle also answers the objection taken, that the plea is defective in not shewing that defendant had occupied the premises or paid the sum stipulated. As to the defendant not being bound to perform, the plea states that his agreement was founded on a good consideration, and we do not understand why that is not enough to shew that he was legally bound to perform it, when the plaintiff accepted such agreement in satisfaction of a liability of defendant to himself.

Judgment for defendant on demurrer.

GRIFFIN V. WILLIAM LATIMER AND JAMES ASHFIELD.

Promissory note-Pleading.

Plaintiff declared against L., and A. as endorsers of a promissory note payable to the order of L., averring that the defendants duly endorsed the said note, and that A. delivered the said note so endorsed to the plaintiff.

Held, on demurrer, that A. must be taken to be the immediate endorsee of L., and could not deny L.'s endorsement.

Assumpsit on a promissory note made by one Francis Dowler, payable to the order of the defendant William Latimer. Averment, that the said defendants William Latimer

and James Ashfield afterwards duly endorsed the said note, and the said James Ashfield delivered the said note so endorsed to the plaintiff.

endorsed to the plaintiff.

Plea, by defendant Ashfield, that the said defendant
William Latimer did not endorse modo et formâ.

Demurrer.

Richards for the demurrer; Eccles contrs. In addition to the cases cited in the judgment, The Bank of Upper Canada v. Sherwood, 8 U. C. R. 116; and Sanderson v. Collman, 4 M. & G. 209, were referred to.

DRAPER, J. delivered the judgment of the court.

We are of opinion that the plea is bad. Without entering into the question suggested by the case of Armani v. Castrique (13 M. & W. 443), which is not in accordance with Lord Ellenborough's ruling in Critchlow v. Parry (2 Camp. 182), we are of opinion that on this declaration we must take the defendant James Ashfield to be the immediate endorsee of the defendant Latimer; and it is certainly against reason, and also against the principle of many decided cases, if he can be permitted to deny the endorsement of the party from whom he directly derives his own right and title—Braithwaite v. Gardiner (8 Q. B. 473), is authority which appears strongly to support our conclusion.

Judgment for plaintiff on demurrer.

ANDREWS V. TALBOT ET AL.

Demurrer-Promissory note-Initials.

In averring the making or endorsement of a note it is sufficient to describe the party by the initials of his Christian names, without alleging that the making or endorsement was by such initials.

Assumpsit on a promissory note, averring that said note was made by one Freeman Talbot, payable to Ralph S. Talbot or order, who then endorsed and delivered the said note so endorsed to one A. D. Cameron, who then endorsed and delivered the said note so endorsed to the defendants Frazer and Galbraith, who endorsed to the plaintiff.

Demurrer-That the Christian name or names of the said

A. D. Cameron is not shewn, nor any reason alleged for not shewing the same in full, nor is it alleged that he endorsed by his initials.

Read for the demurrer. Wilson, Q. C., contra.

DRAPER, J., delivered the judgment of the court.

This demurrer brings up the objection to the initial letters of a Christian name being used, in a new form. The endorsement is stated in the declaration to have been made by one A. D. Cameron.

This court, in Dougall v. Reafish (6 U. C. R. 391), and in Bank of Upper Canada v. Gwynne (7 U. C. R. 140) have determined that in any case in which one Christian name shall be given in full, with a capital letter before or after it, besides the surname, they will not assume that the party so described had anything more of a second name than is given to him, and this without such distinction as has been taken in England between vowels and consonants.

I am glad that we have the authority of the Lord Chief Justice of England for disregarding this distinction. In Regina v. Dale (17 Q. B. 66), he says: "Nor can I acquiesce in the distinction suggested between a consonant and a vowel. There is no doubt that a vowel may be a good Christian name: why not a consonant? I have been informed by a gentleman of the bar sitting here, on whose accuracy we can rely, that he knows a lady who was baptized by the name of "D." Why may not a gentleman as well be baptized by a consonant?"

In Lomax v. Landells (6 C. B. 577), which maintains the distinction between a vowel and a consonant, the court said that a statement of a Christian name, as consisting of the vowel "J" was sufficient, and gave judgment against a demurrer which treated this as an initial, and refused the defendant leave to withdraw his demurrer.

These cases are sufficient authority for us to treat the letter "A" as a full name, and then our previous decision, that when there is one full Christian name it is enough, though it be preceded or followed by an initial, and that a consonant, will apply.

Judgment for plaintiff on demurrer.

IN RE CAMERON AND THE MUNICIPALITY OF EAST NISSOURI.

By-laws-Rules for construction of-Certainty.

In construing a by-law the court will not intend that the municipality are trying to evade compliance with a statute, but will give every reasonable help of construction to bring the by-law within it.

help of construction to bring the by-law within it.

They will also look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give full

effect to the whole.

Where a by-law recited that the amount of the whole ratable property of the township, according to the last assessment returns, was £114,756, and that it would require the annual rate of $2\frac{1}{2}$ d. in the pound as a special rate, for payment &c., and then enacted that a special rate of $2\frac{1}{2}$ d. should be levied to pay the principal and interest of the loan to be raised under the by-law, and that the proceeds of such special rate should be applied solely to the payment &c, until the same be fully paid and satisfied; Held, that the recital as to the amount of ratable property and the assess-

Held, that the recital as to the amount of ratable property and the assessment returns was sufficient, and that it sufficiently appeared that the rate

was to be levied in each year.

In one part of the by-law the Reeve was empowered to issue debentures for such sums as should be from time to time required for the purposes mentioned, but not to exceed in the whole £10,000; in subsequent clauses a special rate was imposed to pay "the said sum of £10,000," and the application of "the said sum of £10,000" was pointed out: and the debentures were directed to be made payable "within twenty years of the time that this by law shall come into operation." Held, that the amount of the loan, and the time when the debentures were to be made payable, was stated with sufficient certainty.

C. Robinson, in Hilary Term, obtained a rule calling on the Municipality of the township of East Nissouri to shew cause why a by-law passed by them on the 8th of January, 1855, entitled a by-law to raise by way of loan £10,000, payable within twenty years, for the purposes, &c., should not be quashed, wholly or in part, with costs; because, 1st, The amount of the whole ratable property of the township, according to the assessment returns for the financial year next preceding the passing of the by-law is not set forth therein. 2nd. That it is not stated with sufficient certainty, according to the assessment returns, for what financial year the amount of the ratable property is ascertained. 3rd, Nor at what period the debentures mentioned in the by-law are to become payable. 4th, That the special rate in the pound authorized to be levided is not based on the amount of the whole ratable property in the township, as such amount is ascertained by the assessment returns for each township for the financial year next preceding that in which the by law was passed. 5th, That it does not appear that the rate is sufficient for the purposes of the by-law according to the returns of such financial year. 6th, That no special rate is directed to be levied in each year for the payment of the loan. 7th, That the amount of the loan is not stated with sufficient certainty, but is left to the discretion of the reeve, and it is uncertain what sum may be borrowed.

In this term, M. C. Cameron, shewed cause. The material parts of the by-law and the statutes referred to are set out in the judgment.

DRAPER, J., delivered the judgment of the court.

The by-law contained the following recital-" Whereas the amount of the whole ratable property of the township of East Nissouri, according to the last assessment returns, was £114,756, and it will require the annual rate of 21d. in the pound on the said ratable property as a special rate for the payment," &c. It appears to us this is sufficient. We ought not to intend that the municipal council are trying to evade compliance with the statute, but should, we think, give every reasonable help of construction to bring their by-laws within it. 12 Vic. ch. 81, sec. 177, enacted that no by-law for the negotiation of any loan shall be valid to bind such municipal corporation, unless a special rate per annum, over and above, and in addition to all other rates whatsoever, shall be settled in such by-law, to be levied in each year, for the payment of the debt created by the loan to be negotiated, nor unless such special rate shall be sufficient, according to the amount of ratable property in such township, as shall appear by the then last assessment returns of such township, to satisfy and discharge such debt, with the interest, within twenty years from the passing of such by-law. Now, unless we assume that the municipal council wished to evade the statute while apparently complying with it, we ought to hold that the recital according to the last assessment returns means what this clause requires. The 14 and 15 Vic.ch. 109, sec. 4, gives more particular directions, that in every-by-law for contracting a loan there shall be recited by way of preamble, 1st, The amount, and in some brief and general terms the object of the loan. No objection is raised on that score. 2nd, The amount required to be raised annually, according to the 117th section of the act 12 Vic., ch. 81, as a special rate for the payment of such debt or

loan and interest, within the time thereby limited (i.e. twenty years), at the days when the same shall become payable according to such by-law. 3rd, the amount of the whole ratable property of such township, according to the assessment returns for the then next preceding financial year. 4th, The annual rate in the pound on such ratable property required as a special rate for the payment of the interest and the creation of a sinking fund. We think the recital as to the amount of ratable property and the year sufficiently complies with this latter act.

Before referring particularly to other objections, I will state that in my opinion we should look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give full effect to the whole. Acting on this rule, we find that, though in one part the reeve is empowered to cause debentures to be made out for such sums as may be from time to time required for the purposes mentioned, but not to exceed in the whole £10,000: we find also, in the fourth section, that a special rate is imposed for the purpose of "paying the said sum of £10,000," with interest, and in the 5th section the application of the "said sum of £10,000" is pointed out. Taken together, this shews clearly enough that £10,000 is to be the whole amount raised, for which the reeve is to cause debentures to be issued from time to time for such sums as may be required; that is, leaving it in his discretion, according to circumstances, what sum any debenture may be given for, whether £100 or £200, or any less or greater sum, "so as not to exceed in the whole £10,000," the sum the necessity for raising which is the first part of the recital. Then, again, it is enacted that a certain special rate will be necessary for the payment of the interest and for the creation of a sinking fund to pay the principal, according to the requirements of the 12 Vic. ch. 81, and the 14 and 15 Vic. ch. 109, both of which require the payment to be within twenty years from the passing of the by-law. The by-law enacts that the debentures shall be made payable "within twenty years of the time that this by-law shall come into operation." The two taken together, though not as precise as they might be, and without the aid of a schedule shewing clearly what is

meant for each year, nevertheless, we think, import sufficiently authority and direction to the reeve to issue debentures which shall run as long from the time of their issue, but no longer, that the statutes permit; and this at present appears to us to be enough. We think, therefore, the third objection fails. As to the fourth, there is nothing before the court to shew that this objection is founded in fact. I am not quite sure I understand what is meant; but either it is an assertion without proof, or it is a renewal in a varied form of the first and second objections.

The fifth objection is, that it does not appear that the rate is sufficient for the purposes of the by-law, according to the return of the financial year. We think some ground should be brought before us to shew that it is sufficient, and that, this not being done, we should assume its sufficiency. It was hardly meant, we suppose, to ask the court to make a calculation in order to determine the question.

The sixth objection is, that no special rate is directed to be levied in each year for the payment of the loan. The recital states, "that it will require the annual rate of 23d. in the pound" to pay the interest and the principal according to the requirements of the statutes: and the fourth section enacts, "that a special rate of 21d. in the pound shall be raised for the purpose of paying the said sum of £10,000, with the interest thereon, and the proceeds of such special rate shall be applied solely to the payment of such debentures and the interest thereof, until the same be fully paid and discharged." The statute 14 & 15 Vic. makes the preamble to a by-law an essential part of it, and requires the rate to be raised annually to be recited. When this is done, and then the rate is afterwards formally imposed, and for the purpose of paying principal and interest of a loan which is to be discharged within twenty years, we think we may construe the whole together as imposing the special rate annually, though the word annual is not used in the section.

The seventh objection has been already answered in noticing the third.

On the whole we think the rule must be discharged with costs.

Rule discharged,

REGINA V. HYNES.

Indictment for converting note intrusted to prisoner for special purpose—Evidence of conversion—" Agent"—4 & 5 Vic. ch. 25, sec. 41.

The prisoner was convicted upon an indictment under 4 & 5 Vic. ch. 25 sec. 41, charging that one W. intrusted to him for a special purpose—viz, for the purpose of exhibiting to B. and obtaining another note made by prisoner to and endorsed by B. the said prisoner then being the agent of W.,—a promissory note made by prisoner payable to and endorsed by B., being a valuable security, without any authority to sell, transfer, &c., or convert the same to his own use; and that, in violation of good faith, and contrary to the purpose for which such note was intrusted to him, he unlawfully kept and converted it to his own use.

It appeared that the prisoner gave an endorsed note, payable at Kingston, in payment of goods purchased, with an agreement that in case the payee should be unable to get it discounted at Kingston he would procure for him a new note, with the same endorsers, payable at Belleville. The payee being unable to get a discount at Kingston, sent the note to W. at Belleville with instructions to get a new note from the prisoner as agreed on; W. instrusted the prisoner with the note, on his promise that he would take it to the endorsers, and either return it or bring back a new note at once. The prisoner however kept the note, and neither returned it nor procured another, though often requested to do so, both by the payee and W.

Held, that the prisoner was not an agent within the meaning of the statute,

and that the conviction must be quashed.

Semble, also, that it could not be said that the prisoner was intrusted with the note without any authority to transfer or pledge the same; or that his retaining it was proof of converting it to his own use.

The prisoner was convicted at the November sessions at Belleville, on an indictment charging, in the first count, that one William Patrick Wilson intrusted to him for a special purpose, "to wit, for the purpose of exhibiting to certain. persons, using the name, style, and firm of G. and J. Brown; and for the purpose of obtaining another promissory note made by the said William L. Hynes, payable at Belleville, in the county of Hastings, to, and endorsed by the said G. and J. Brown, for the sum of £48 3s. 2d., the said William L. Hynes then being the agent of the said William Patrick Wilson," a promissory note of the said William L. Hynes for £48 3s. 2d. payable at the city of Kingston to, and endorsed by G. and J. Brown, being a valuable security, without any authority to sell, negociate, transfer, pledge, or convert to his own use and benefit the said last mentioned note; and that the said Hynes, agent as aforesaid, on &c. at &c., in violation of good faith, and contrary to the object and purpose for which such last mentioned note was intrusted to him as aforesaid, unlawfully did keep and convert to his own use and benefit the said note, being a valuable security as aforesaid, against the form of the statute, &c.

The second count was similar, except that the note was alleged to have been intrusted to the prisoner by one James John Whitehead.

It appeared in evidence that the prisoner had purchased some goods from Mr. Whitehead, who resided in Kingston, and gave as security for the price a note endorsed by G. and J. Brown, for £48 3s. 2d. payable in Kingston, with the agreement that if Whitehead could not get it discounted there, a new note was to be procured, payable at Belleville. Mr. Whitehead having failed in getting the note discounted at Kingston, sent it to W. P. Wilson, at Belleville, with instructions to get from Hynes a new note according to the agreement. Wilson handed the note to the prisoner, who promised that he would go to the Browns, and bring back either that or a new one immediately. Both Whitehead and Wilson had seen the prisoner repeatedly before and after the note matured, and asked him either to return the old note or get a new one, which he had frequently promised but failed to do.

Bell moved to arrest the judgment, on the ground that the prisoner was not such an agent as is contemplated by the statute 4 & 5 Vic., ch. 25, sec. 41.

The case was reserved for the consideration of this court. Hagarty, Q. C., for the prisoner.

DRAPER, J., delivered the judgment of the court.

The case is not so clear for the prisoner as I thought at the argument, for not having the statute to refer to, my impression was, that the indictment was insufficient for not stating whose property the promissory note in question was. The indictment conforms to the words of the statute, and very nearly to some of the precedents; but we are of opinion that we cannot uphold the conviction upon the evidence.

The statute enacts, that if any chattel or valuable security, &c., &c., shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negociate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, &c., shall have been intrusted to him, sell, negociate, transfer, or

pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds, &c., &c., every such offender shall be guilty, &c.

Until an act similar to this was passed in England, the 52 Geo. III. ch. 63 was in force. That statute describes the parties who were intended to be subject to its provisions as "bankers, merchants, attorneys, or agents of any description whatever." Lord Chief Justice Abbott held that this act applied only to persons to whom such securities were intrusted in the exercise of their function or business:—that is, as I understand, persons the nature of whose occupation was such that chattels, valuable securities, &c., belonging to third persons would in the usual course of their business be intrusted to them—Rex v. Prince (2 C. & P. 517). That the statute is rather more general in reference to agents than ours, and the decision is fully as applicable to the term "agent" as to that, "agent of any description whatever," and it is therefore an authority against the present conviction.

There are other questions which present themselves. Can it be said on this evidence that the prisoner was intrusted with this note "without any authority to sell, negociate, transfer, or pledge" the same, or that his retaining it is proof of his converting it to his own use, when the very object for which it was given to him, if fulfilled, permitted, if not required, that he should either cancel or at least keep the note? And is the fact of his holding it under such circumstances evidence of such conversion to his own use? It may have been the depriving the prosecutor of the use and advantage of this note, but I do not see how the prisoner in retaining a promissory note of which he was maker, and which was endorsed for his accommodation, can be said to have converted a valuable security to his own use. To me it appears, apart from the first objection, on which, however, our judgment is founded, that the case is not within the statute.

In our opinion the conviction was improper. See R. v. Jelf, quoted in 1 Deac. Crim. Law 377.

McNamee. v. Reilly et al.

Practice-Dropping defendant in declaration-Recognizance of bail-Assessment of damages.

It is not irregular to omit in the declaration some of the parties named as defendants in the writ; and if it were, a demand of security for cost made

after declaration served would be a waiver.

A recognizance of bail to the limits is not within the statute S. & 9 W. III. ch. 11; and when there is no plea, but a breach is assigned in the declaration the plaaintiff may enter final judgment without any assessment of damages.

S. M. Jarvis obtained a rule nisi to set aside the final judgment in this cause and the execution, with costs—1. For irregularity, because one Patrick Reilly was named as a defendant in the writ of summons, and the judgment contains no entry of Nolle Prosequi as to him. 2. That the plaintiff could not enter final judgment without assessing damages on the breach assigned in the declaration. 3. That there is nothing in the declaration or proceedings filed to warrant the judgment as it is entered, or for the sums therein mentioned; and why, after setting aside the judgment, proceedings should not be stayed until security for costs be given by the plaintiff; or why the judgment and execution should not be set aside, on the affidavit of merit now filed, and why the plaintiff should not pay the costs of the proceedings in chambers, and of this application. The rule was drawn up on reading the affidavits and papers filed in chambers, and the order of the Chief Justice of the Common Pleas, and on affidavits and papers filed at the time of making application.

It was alleged also that the judgment had been signed contrary to good faith, but the affidavits on this point were repealed by those filed on the part of the plaintiff, and the court therefore did not give effect to this ground of objection.

The action was debt against the two defendants for £100. The declaration stated that the plaintiff had recovered a judgment against one Patrick Reilly for £22 17s. 8d., in assumpsit; that on the 6th of November, 1855, the plaintiff issued a Ca. Sa. to the sheriff of York and Peel, returnable on the first of Michaelmas term then next, endorsed to detain Patrick Reilly for £13 16s. 11d. damages, and £9 0s. 9d. costs, &c. &c. It set forth the arrest of Patrick Reilly, and his detention in custody under the Ca. Sa. until he, being desirous of obtaining the benefit of the limits, the defendants having agreed to become bail for his remaining within

the limits, entering into a recognizance before a commissioner, &c., and thereby became pledges and bail to the limits for the said Patrick Reilly, and undertook that he should remain within the limits, &c., &c., until, &c.,; and in the event of his failing in any particular, that defendants would pay such sum as Patrick Reilly would be liable to pay: that such recognizance was duly filed in court, and was duly allowed, and that Patrick Reilly became entitled to the benefit of the limits—Breach, that he did not remain within the limits, but departed and went beyond the same; that Patrick Reilly, at the time he so departed, was liable to pay a large sum of money, costs, sheriff's fees, and poundage, to wit, £50 whereby an action hath accrued to demand and have £100.

J. Blevins shewed cause.

DRAPER, J., delivered the judgment of the court.

- 1. According to the case of Caldwell v. Blake (2 Cr. M. & R. 249), the omitting to declare against all the parties named in the writ is no irregularity. If separate proceedings had been taken against the three defendants, as by declaring against them all in separate suits, that they would have been irregular—Pepper v. Whalley (1 Bing. N. C. 71). But that is not the case here; besides, the demand of security for costs was made after declaration served, and therefore after knowledge of the irregularity, if it was one.
- 2. This is an action of debt on recognizance, and clearly not within the statute of Wm. III. relating to bonds with condition. The cases cited by Mr. Jarvis, both in England and in our own courts, relate to bonds only, and therefore are inapplicable. The whole ground of the plaintiff's recovery is matter of record. There is nothing on the face of the declaration to make the amount to be recovered uncertain, and to render a writ of enquiry necessary. If a proper recognition roll had been made up, I presume the plaintiff might have sued out a sci. fa. quare executionem non. If he desired to recover damages, for interest, for example, or for any other matter not strictly falling within the terms of the declaration, a writ of enquiry might be necessary; but as nothing of that sort is suggested, we must assume that the

execution is not endorsed to levy more than it should be, and if it were, the application would only be to restrain.

As to setting aside the judgment and execution on an affidavit of merits, my learned brother is disposed to relieve, particularly as the Chief Justice of the Common Pleas proposed that course on terms, when the matter was before him at chambers. I shall not dissent from his opinion, though it can only be on payment of costs, as the rule was moved on two grounds with costs, both of which have failed.

HOWLAND V. BROWN.

Contract for sale of flour f. o, b .- Liability of vendee for warehouse charges. One E. in February, sold defendant certain flour to be delivered in May following, f. o. b. (meaning free on board the vessels which were to take it from Hamilton.) The flour was delivered in May, but defendant had no vessels then ready, and E. stored it with the plaintiff subject to defendant's orders, paying all charges on it up to the end of May.

Held, that the defendant was liable to the plaintiff for subsequent warehouse charges up to the time of shipment.

This was an appeal from the County Court of the county of Wentworth. It was an action of debt brought to recoverfees for storage of certain goods. Plea-Nunquam indebitatus.

The plaintiff below obtained a verdict for £22 1s. 8d., subject to the opinion of the court. Upon argument of the points reserved judgment was given for the plaintiff, and

from this decision the defendant appealed.

Springer, for the appellant, cited Wilmot v. Wadsworth, 10 U. C. R. 594; Proudfoot v. Anderson, 7 U. C. R. 573; Bentall v. Burn, 3 B. & C. 426; 5 D. & R. 284, S. C.; Farina v. Home, 16 M. & W. 1 20, 20 Eng. Rep. 524; Story on Bailments, sec. 589; Beckett v. Urguhart, 1 U. C. R. 188; James v. Griffin, 1 M. & W. 26; 2 M. & W. 633, S. C.

The facts of the case are sufficiently stated in the judgment.

Burns, J., delivered the judgment of the court.

We are at a loss to see how any doubt could be entertained in this case. On the 2nd of February, 1854, Mr. Ewart, through a broker, sold 4000 barrels of flour to the appellant, to be delivered in May following, f. o. b., meaning free on board the vessels which were to transport it from Hamilton.

The contract was to pay in cash £1000, and £3500 by promissory notes payable at the time the flour was to be delivered. The same day the appellant paid £1000 in cash, and gave his promissory notes according to the contract. The flour was delivered according to contract at Hamilton in the month of May, but the appellant had not vessels there to put the same on board. It was proved that the flour was put into the respondent's warehouse subject to the appellant's orders, and Mr. Ewart paid all charges upon it up to the 31st of May. The flour was not all shipped until early in August. The argument for the appellant, that he is not liable for the storage subsequent to the 31st of May, and that Mr. Ewart is, if storage can be collected from any one, proceeds upon the idea that the contract of Mr. Ewart is not complete until the flour is actually on board the vessel, and that it lay in the respondent's warehouse subject to Mr. Ewart's order. The question depends upon the construction of the bought and sold note, and not upon the broker's opinion of what was or was not a reasonable time for the flour to remain in store. The bought and sold note is that the whole quantity, dividing it into parcels, shall be deliverable in the first, second, and last week in May, free on board. The seller, Mr. Ewart, had accomplished all he could do, and had the flour ready to be put on board by the 31st of May free of charge, for he had paid all charges to that time. Then at whose risk was the flour after the 31st of May? The appellant was bound to furnish 'vessels ready to receive the flour by the time that Mr. Ewart was bound by the contract to deliver. The obligation to receive is mutual with the obligation to deliver; and if the seller be ready to deliver, and does all he can for the purpose, but the buyer is not ready to receive, the risk must remain with him. The question depends simply upon the construction of the bought and sold note, and upon the evidence, whether Mr. Ewart had complied with his part of the contract; and we must say we entertain no doubt he did comply with his contract, and that the flour remained in the wavehouse at the risk of the appellant after the delivery there and charges paid. The property being that of the appellant was liable to the charges of the warehouse keeper after the same became appellant's property.

Appeal dismissed, with costs.

LIGHT V. THE WOODSTOCK & LAKE ERIE RAILWAY AND HARBOUR COMPANY.

Pleading-Duplicity-Accord and satisfaction.

Assumpsit for work and labour. 4th Plea—That on &c., an account was stated between plaintiff and defendants of the causes of action declared on, and of other cross claims by each party against the other, and on such accounting £200 was found due by defendants in respect of the said causes of action, which defendants then promised to pay; that the defendants then delivered to the plaintiff, and the plaintiff received from defendant, their agreement in writing to pay the said sum of £200, in full satisfaction and discharge thereof, and of the causes of action declared on. The fifth plea averred the accounting as before, and that it was agreed that plaintiff should draw a bill of exchange upon the defendants for the £200, to be accepted by the defendants and received by the plaintiff in satisfaction of the £200, and that the bill was accordingly drawn, accepted, and received by the plaintiff in satisfaction of the said £200.

Held, on demurrer, that the plaintiff, in his replications, might traverse both the accounting and the acceptance by plaintiff in satisfaction.

Assumpsit on the common counts, for plaintiff's salary as secretary of the defendants.

Fourth plea--That after the accruing of the said causes of action, and before the commencement of this suit, to wit, on &c., the plaintiff and defendants accounted together, and an account was then stated between them, of and concerning the said causes of action, and of and concerning certain other claims and demands of the plaintiff against the defendants, and certain other claims and demands of the defendants against the plaintiff, and on the said accounting the sum of £200, and no more, was then found to be, and then was due and owing from the defendants to the plaintiff in respect of the causes of action in the declaration mentioned, which said sum of money the defendants then promised the plaintiff to pay him; and the defendants further say, that after the accruing of the said several causes of action in the declaration mentioned, and after the accounting in this plea mentioned, and before the commencement of this suit, to wit, on the day and year last aforesaid, the defendants delivered to the plaintiff, and the plaintiff then accepted and received of and from the defendants, the certain agreement in writing of the defendants, and which being in the possession of the plaintiff the defendants cannot produce to the court, by them made and sealed, and as their act and deed delivered to the plaintiff, whereby the defendants did covenant to and with the plaintiff to pay him the said sum of £200 in full satisfaction and discharge thereof, and of the causes and rights of action in the declaration mentioned, and the plaintiff did then accept and receive the same in such satisfaction and discharge: verification.

Fifth plea, setting up an accounting as in the last plea, on which the sum of £200 was found due, which said lastmentioned sum of money the defendants then in consideration of the last-mentioned premise, promised the plaintiff to pay him; and the defendants further say, that after the accruing of the said several causes of action in the declaration mentioned, and after the said accounting in this plea mentioned, and before the commencement of this suit, and before any breach of said last-mentioned promise, it was agreed by and between the plaintiff and the defendants, at the request of the plaintiff, that the plaintiff should make his bill of exchange in writing, and direct the same to the defendants, and should thereby require the defendants to pay the plaintiff, or order, the said sum of £200, ten days after sight thereof, and that the defendants should accept the same, and undertake to pay the amount thereof to the plaintiff, or order, according to the tenor and effect thereof, and that the plaintiff should accept and receive the same of and from the defendants in full satisfaction and discharge of the said sum of £200; and the defendants further say, that afterwards, and before the commencement of this suit, to wit, on &c., the plaintiff, in pursuance of said agreement, did make his bill of exchange in writing, and directed the same to the defendants, and required the defendants thereby to pay to the plaintiff, or order, the said sum of £200 so due to him as aforesaid, ten days after sight thereof, and did then present the same to the defendants for their acceptance thereof, and the defendants did then accept the same, and did by force of their said acceptance undertake and agree with the plaintiff to pay the plaintiff, or order, the said sum of £200 according to the tenor and effect thereof, and did then, and before the commencement of this suit, deliver the same to the plaintiffs, who then accepted and received the same from the defendants in full satisfaction and discharge of the said sum of £200; verification.

Replication to the fourth plea-That no such accounting

between the plaintiff and the defendants took place or was had, as in the said fourth plea is alleged, nor did the plaintiff accept or receive the said agreement in full satisfaction or discharge of the sum, or of the causes of action and rights, in the said fourth plea mentioned.

Replication to the fifth plea—That no such accounting between the plaintiff and the defendants took place or was had as in the said fifth plea is alleged, nor did the defendants accept the said bill of exchange in the said fifth plea mentioned, as in the said fifth plea is alleged.

Demurrer to these replications—That the same are respectively double and multifarious, in this, that they respectively traverse and put in issue the several and respective allegations of accounting and satisfaction, either one of which should have been traversed alone.

Joinder in demurrer and notes of exceptions to the pleas— That the same are respectively double, and contain more than one substantial defence; and that the said fourth plea is double and uncertain, in that it contains more than one substantial defence, and in that it does not appear thereby whether the defendants rely as a defence on the existence of a binding promise by them to pay the sum found due on the alleged accounting therein referred to, or on the alleged covenant to pay therein referred to, or on the alleged record and satisfaction therein referred to; and that the said alleged covenant is not sufficiently stated in full in the said fourth plea, nor is it stated in the said fourth plea whether the said covenant operated as a merger of the said promises; and that it is not shewn in the said fifth plea how the said bill of exchange therein referred to was accepted, and that the defendants could not legally accept the said bill of exchange, and at all events not without seal.

Eccles, for the demurrer, cited Hanscombe v. Macdonald, 4 C. P. 190.

Hagarty, Q. C., contra, cited Melville v. Carpenter, 11 U. C. R. 132; Beattie v. Hatch, 12 U. C. R. 195; Lane v. Riddle, 10 Q. B. 477; Pussord v. Peek, 9 M. & W. 196; Sibree v. Tripp, 15 M. & W. 23.

Burns, J., delivered the judgment of the court.

The first of these pleas, the replication to which is demurred to, is open, we think, to the objection of being considered double. The plea, besides setting up the subsequent accounting, goes on to shew that the release, which it is said was in satisfaction of the £200, the amount found due to the plaintiff on the subsequent accounting, was in full satisfaction and discharge of that sum, and also of the causes and rights of action in the declaration mentioned. Then, according to Lane v. Ridley (10 Q. B. 479), the defendants cannot complain that the plaintiff has replied double, he himself having offered two defences. Suppose, however, that it may be argued, as upon the other plea, the replication to which is demurred to, that both propositions-viz., the subsequent accounting and finding of £200 due and more, and that a bill of exchange was given and accepted in satisfaction of the £200—all formed one defence, and does not render the plea double, then the question is, upon the first plea, as upon the other, is the plaintiff compelled to admit one part of the plea. and deny another part, or can he traverse the whole. is not the case of setting up matter of record, or title or interest, by the defendant, in addition to other facts necessary to constitute a defence. If it be necessary for the defendants to allege all the facts they have stated in order to constitute one defence, it is open to the plaintiff to deny them all—that is, the facts as disclosed upon these pleas—the plaintiffs not being obliged to admit any of them, according to the rules of pleading. The answer of the plaintiff is as much single as the defence offered-Vide De Bernardy v. Spalding 4 Q. B. 823), Webb v. Weatherly (1 Bing. N. C. 502, Washburn v. Burrows (1 Ex. 107).

Judgment for plaintiff on demurrer.

HUBBARD V. WALKER ET AL.

Building agreement-Construction of-Liability-Destruction by fire.

In an action for work and labour against A. and B. the plaintiff put in an agreement headed "An estimate for carpenter and joiner work of a brick cottage, to be done for Mr. William Walker" (defendants' father.) Then followed the specifications and an agreement, by plaintiff to do the work. Receipts were endorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was to find materials, and no time was mentioned for completion of the work.

Held, that parol evidence was admissible to shew that defendants were liable on the contract.

Held, also, that the destruction of the building by fire before the completion of the plaintiff's work could not but defeat his claim for what he had already done.

Assumpsit on the common counts, for work and labor, and materials, &c. Pleas-Non assumpsit, and payment.

At the trial, before Burns, J., at the last assizes at Hamilton, the facts of the case appeared to be these :—the plaintiff was a carpenter, and on the 3rd of March, 1854, agreed to do the carpenter work on a certain brick house erected on land owned by the father of the defendants. He was not to provide materials, and no time was mentioned within which the work was to be completed. The house was accidentally burned on the 27th of February last, before the plaintiff had completed the carpenter work, and while he was in the act of still working at it. Evidence was given, in order to charge these defendants, that they were seen about the building giving directions about the work, but being perhaps not sufficient for the jury to come to the conclusion that they were chargeable with the work, the plaintiff then called the father of the defendants. He stated that in 1852, the defendants, his sons, had made an arrangement with him to take the farm and work it, and support him and the family and themselves, and to build a house upon it for his use. The defendants were to furnish money by sale. of the crops, and otherwise to build the house, and were ultimately to have the benefit of the house together with the land. The house burned was the house the defendants were to build upon the farm, and the father stated that he made some payments to the plaintiff during the progress of the work, and the defendants also made some. On his cross-examination he stated that his sons, the defendants, were his agents, and that he alone was liable; that he sent them to the plaintiff to obtain estimates of the work before the agreement was

entered into, and having obtained them he then wrote an agreement dated 3rd of March, 1854. This was produced, and it appeared to be headed "An estimate for the carpenter and joiner work of a brick cottage to be done for Mr. William Walker, (the father,) namely," &c. Then followed the specifications, and at the bottom the agreement as follows:—

"I Zachariah Hubbard, carpenter and joiner, do hereby agree to do the above-mentioned work for the sum of £104 5s. currency, and board myself. The flooring to be machine dressed, or otherwise an extra charge of £3 10s."

(Signed,) "ZACHARIAH HUBBARD."

The father stated that he was alone liable for the work.

The defendants' counsel then objected that the contract was in fact with the father of the defendants, and if so this action could not be sustained.

The plaintiff's counsel admitted he was taken somewhat by surprise by the written paper, for he had always understood that no name had been mentioned in the estimate, which had been given in by the plaintiff, but he contended that upon the evidence it was a question for the jury to say whether in fact, though the name of the father was introduced in the estimate of the work, it was in truth done for the defendants, who were to reap the benefit and advantage of it, and who had agreed with their father that they would build the house.

Before proceeding further with the case, the learned judge submitted the question to the jury, to say whether the contract for the work was with the father alone, or with him as agent for the defendants; that is, whether the plaintiff had contracted with them through the agency of the father, he looking to the credit of the defendants for his work, or whether he had contracted with the whole three.

The jury found that that the plaintiff contracted with the defendants only.

The case then proceeded, and the defendants' counsel contended that the contract was entire, the whole work to be done before the amount was to be paid, and that payment could not be called for till the work was done, and that the destruction of the house by fire before being completed did not entitle the plaintiff to be paid for what work had been done.

On the other hand the plaintiff's counsel contended that neither of the parties understood that the whole work should be completed before the plaintiff should be paid, for the parties had paid the plaintiff from time to time various sums: that the plaintiff was entitled to recover the value of his labour as far as the work had proceeded, notwithstanding the destruction of the house; and to arrive at this, evidence was given to shew what work remained to be done at the time of the fire, and the value of it; and such evidence, together with the payments made, would enable the jury to estimate the value of the work done which had not been paid for.

The learned judge submitted to the jury to estimate the value of the work so done not covered by the payments, and reserved leave to the defendants to move to enter a nonsuit, if the court should be of opinion that the plaintiff, under the circumstances of the fire occurring before the work was completed, was not entitled to recover.

The jury found for the plaintiff £33 4s. 2d.

Martin obtained a rule nisi for a new trial on the law and evidence, or for a nonsuit pursuant to the leave reserved. He contended that it was a question of law upon the evidence for the judge to decide, whether the contract was entered into with the defendants' father, and that upon production of the written memorandum of the contract, and upon the evidence, the judge should not have left the question to the jury to say with whom the contract was made—He cited Taylor on Evidence, 745, 746; Addison on Cont. 41, 193, 775; Peters v. Opie, 1 Vent. 177; Sinclair v. Bowles, 9 B. & C. 92; Ellis v. Hamlen, 3 Taunt. 52; Zagury v. Furnell, 2 Camp. 240; Rugg v. Minett, 11 East 217.

Freeman shewed cause, and cited Menetone v. Athawes, 3 Burr. 1592.

DRAPER, J., delivered the judgment of the court.

Two points are raised on the defence in this case. The first is, whether the learned judge should have left it to the jury to say with whom the plaintiff contracted to do the work, for the value of which this action is brought. The second, whether, inasmuch as the house was destroyed by fire before all the work was completed, he is entitled to recover.

As to the first question, if it was properly submitted to the jury, there is not perhaps, though it is doubtful to my mind, any sufficient reason for disturbing their conclusion. But the

objection is, that the plaintiff made a contract in writing: that on the face of that contract it is shewn with whom it was made; and that parol evidence was not admissible for the purpose of shewing that the defendants, and not the party named in the contract, are the parties to whom the plaintiff has a right in this action to look for payment as the parties primarily responsible. The instrument is headed thus, "An estimate for the carpenter and joiner work of a brick cottage to be done for Mr. William Walker," then follows a specification of the work to be done, at the foot of which is written "I, Zachariah Hubbard (the plaintiff), carpenter and joiner, do hereby agree to do the above-mentioned work for the sum of £104 5s. currency, and board myself. The flooring to be machine-dressed, or otherwise an extra charge of £3 10s." This was signed by the plaintiff, Endorsed on this are three receipts, each signed by the plaintiff, acknowledging the receipt of three several sums on account of the within estimate, but not saying from whom received. In order to charge the two defendants the plaintiff called their father, who was the "Mr. William Walker" named in the estimate, who swore that his sons, as agents for him, made the bargain with the plaintiff, and that he was liable to the plaintiff: that he drew up the estimate and agreement and sent it to be signed: that the plaintiff sent the estimate to him in his (the father's) name and then he wrote it out fair for defendant to sign. swore that he owned the farm on which the house was built. but stated that he had let it to his sons, the defendants, and intended to sell it to them; that they had a right to purchase; they were to support the house and family, and were to pay for the house out of the crops, which house would at a future period be for their benefit: that they were to build a house for the witness. It was not stated, however, that any part of this was made known to the plaintiff when he signed the agreement. The father also stated that each of the defendants was equally interested in this arrangement with him; whether there were any writings hetween him and the defendants did not appear. It was proved by other witnesses that one of the sons interfered during the progress of the work giving some directions. From the whole evidence it would seem there had been no direct personal communication between

the plaintiff and the defendants' father, but that the bargain had been made by one or perhaps both of the defendants, the proof of this being the statement of the father that the defendants as his agents made the bargain. The question is not as to the effect and proper consequence of this parol evidence, but of its admissibility for the purpose of charging the present defendants as the parties for whom the work was done. Looking exclusively at the writing, it proves a contract by the plaintiff to do certain work on a brick cottage for Mr. William Walker—that is, for a party not sued. The plaintiff's case is, that this work was really done for the defendants, who were to pay for the brick cottage, to furnish the materials, to become finally the owner of the 'cottage and of the farm on which it was being built, and for this purpose I think the evidence was clearly admissible. I refer to Jones v. Littledale (6 A. & E. 486) Magee v. Atkinson (2 M. & W. 440,) Higgins v. Senior (8 M. & W. 834). There is nothing, therefore, in the objection that the judge should have construed the contract and not have left it to the jury to say whether there was a contract express or implied binding on the defendants. written instrument might be binding on the witness William Walker, and yet that would not prevent the defendants being liable. So far, therefore, the defendants' objection fails.

As to the second objection. The general rule no doubt is, that where a party contracts to sell a certain lot of goods, or to do a specific work, he cannot stop short in the fulfilment of the whole, and sue for a partial performance; but this rule is not without exception. If the buyer of the whole lot of goods accepts part and retains that part, notwithstanding the breach in delivering the whole, he must pay for that part; and if, after part of the work is done, the party for whom it is done takes the benefit of what is done, refusing to have it completed or discharging the other party from completing it, he must pay for what is done. Here was a contract to do certain work for one fixed sum, the defendants furnishing the materials on which the work was to be don'e. Does it lie in the defendants' power to say, the "materials are destroyed on which you had partly performed the work, and it has become impossible for you to perform the rest, therefore we will not pay you anything?" The plaintiff makes no default.

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He has worked more or less nearly towards the completion of the work, and, for all that appears, was ready to go on and fulfil his agreement. But that on which he had partially performed, and was ready to go on and fully perform his agreement is, without any misconduct of his, put beyond his reach; that which the defendants were to supply-namely, the subject matter on which the plaintiff was to work—is gone. We do not see how this comes within the principle of any of the cases cited. Suppose the plaintiff had been absolutely hindered by defendants from finishing the work, there could be no doubt the plaintiff would be at least entitle to recover for what work he had done. Suppose by not furnishing the materials necessary to finish the work, after the plaintiff had advanced a long way in its completion, the finishing was prevented by defendant, a like result would follow. If all had been done, and the house had been destroyed before defendant had, as a fact, entered into possession and accepted the work could that be set up as a reason why the plaintiff, who had done all he had agreed to do, should not be paid? If not, and we have no doubt it could not, why should not the plaintiff be paid for what he has done, the entire completion having been prevented by circumstances for which he is not responsible? I think the rule should be discharged.

Rule discharged.

HUNTER V. BORST.

Case for negligence-Plea bad, as amounting to general issue.

CASE against the defendant as a wharfinger and forwarder, for negligence. The duty alleged was, to keep and store the goods safely, and deliver them to plaintiff. Breach—That defendant, not regarding his duty, negligently put them on board a vessel bound for Hamilton, on board of which they were destroyed. [See the declaration fully set out, ante page 141.]

Plea—That defendant did deliver the goods to the plaintiff according to his duty and retainer in that behalf, as in declaration alleged.

Eccles for the demurrer. Hagarty, Q. C., contra.

The Court on demurrer, held this plea clearly bad, as amounting to the general issue.

TRINITY TERM, 19 VICTORIA.

Present-The Hon. Sir John Beverley Robinson, Bart., C.J.

- " WILLIAM HENRY DRAPER, J.
- " ROBERT EASTON BURNS, J.

JOHNSON V. HAMILTON.

Agreement-Incorporated company-Liability.

Assumpsit for work and labor. The plaintiff put in a paper headed "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Company" of, &c., of the first part, and James Johnson, (the plaintiff,) of, &c. It contained an agreement by the plaintiff to do certain work for specified prices, which "the party of the first part hereby agree to pay," &c., and was signed by the defendant, describing himself as "Pres. V. B.," and by the plaintiff. It appeared that the Victoria Bridge Company had been duly incorporated, and that the plaintiff had received £350 from them on account of this work.

Held, that the plaintiff was not personally liable upon this agreement,

Assumpsit for work and labor, materials found, &c, and on account stated.

Pleas-Non assumpsit, and payment.

The case was tried at the last spring assizes for the county of Middlesex, before McLean, J. The plaintiff put in a paper headed, "Memoranda of agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Company, in the town of London, county of Middlesex, and Province of Canada, of the first part, and James Johnson of the said town of London." It contained an agreement on the part of the plaintiff to cut the stone required for the abutments of the bridge according to specifications, and to build the same, finding all stone and other materials, and performing the whole in a substantial and workmanlike manner, in accordance with the plans and specifications provided by Messrs. Leather and Robinson, for £2 2s. 6d. currency, per cubic yard. In consideration whereof "the party of the first part hereby agree to pay to the said party of the second part the above mentioned sum of £2 2s. 6d. currency, per cubic yard;" and should the

party of the second part unnecessarily delay, the party of the first part shall deduct £2 10s. for each week that the work is delayed, from the amount to be paid to the plaintiff.

Signed. "James Hamilton, Pres. V. B. James Johnson."

Underneath was written an agreement signed by two parties, as sureties for the plaintiff fulfilling his contract. This agreement was proved by a subscribing witness. Mr. Leather, one of the parties named in the agreement, was a witness. He proved that defendant was president of the Victoria Bridge Company, and that the work was done, though not to his satisfaction; and another witness proved that Messrs. Hope, Bennett, Barber, Craig, and the defendant, agreed to pay the plaintiff the full amount due to him. according to the certificate of the engineer. These five persons were the directors of the Victoria Bridge Company, and the defendant was also president.

A nonsuit was moved for, on the ground that the individual liability of the defendant was not shewn: that the work was done, and was contracted to be done, not for him, but for the directors of the company. This was not granted, as no proof had been given that the Victoria Bridge Company was a corporation. The registrar of the county was then called for the defendant, and produced the necessary documentary evidence, to which no exception was raised, that the Victoria Bridge Company was a corporation, under 16 Vic. ch. 190. One of the documents produced was signed by defendant as president, and was under the seal of the company. The plaintiff, in reply, recalled Mr. Leather, who proved that when the work was commenced it was not intended to carry out the original plan in full, and therefore the work was let out by the cubic yard. He proved also that the plaintiff had been paid £350 by the company and a certificate signed by him was put in, of work done at the Victoria Bridge, shewing a balance due to the plaintiff on the 4th of December, 1854, of £428 1s. 3d. The learned Judge directed that this action would not lie against the defendants, the work being done for an incorporated company, and the contract being with that company, and the jury found for defendant.

Eccles, in Easter Term, obtained a rule nisi to set aside the verdict, and for a new trial on the law and evidence, and for misdirection. He relied on Bank of Montreal v. Delatre, 5 U. C. R. 362.

Becher shewed cause, and cited Burls v. Smith, 7 Bing. 705; Story on Agency, section 340, 274, 344.

DRAPER, J .- I am of opinion the verdict is right, and that there was no misdirection. The plaintiff clearly made his contract with this corporation, the Victoria Bridge Company. The memorandum of agreement excludes all idea that he either was, or that he could imagine himself to be, dealing with the defendant as an individual. Nor do I see anything from which it can be inferred that the plaintiff was induced by the defendant to enter into this contract by any direct, or implied representation of his own personal liability, or by the defendant's acting as if possessed of an authority to bind the corporation, when in reality he had no such authority, and they would not recognize his acts. On the contrary, they appear to have treated the plaintiff as contracting with and working for them, and they have paid him nearly half his claim, and the estimate or certificate which he advanced to prove the extent of his demand was made out by the company's architect and engineer. All this shews that the plaintiff and the corporation mutually acted towards each other as the contracting parties, and there was some slight evidence of the use of the bridge which would lead to the conclusion that the plaintiff's work-viz., building the abutments-might be considered as accepted by the corporation. If the corporate seal had been affixed to the contract, I should think there could be no pretence whatever for holding the defendant responsible, and if so, the omission to affix the corporate seal to a contract drawn up in the name and on the behalf of the corporation, and signed by the defendants as its president. his name not previously in any way appearing on it, cannot alter his liability: and this action is not brought upon the contract, strictly speaking, but on the executed consideration of the work being done, as to which, apart from the contract, it is beyond doubt that it is work done for the corporation,

and not for the defendant; and according to the decision in Clarke v. The Hamilton and Gore Mechanics' Institute (12 U. C. R. 178), work for which the corporation would be liable though there was no contract under seal.

I have considered the various authorities, many of which were commented on in The Bank of Montreal v. Delatre (5 U. C. R. 362), and refer also to Bowen v. Morris (2 Taunt, 374); and on the whole I am of opinion this rule should be discharged.

Burns, J.—The case which approaches nearest to the present is that of Hancock v. Hodgson (4 Bing. 269, so far as I have been able to discover. There is a material distinction, however, which prevents it from being an authority to govern this case, and that distinction I find pervades all the authorities bearing upon the question of the personal liability of the directors of a joint stock company. While the affairs are in progress, in order to form a company, the directors for the time being are personally responsible to third persons on contracts for the obvious reasons that if they were not, no one might be liable, but when the company have become fully incorporated, then the liability of the corporation through the agency of those who manage the affairs is complete. I do not mean to be understood that the directors may not be personally responsible as well as the corporation but that must depend upon the terms of the contract. In the present case it is found that a corporation by the name of the Victoria Bridge Company did exist, and that in fact the contract the plaintiff entered into was to do certain work at that bridge. It is said that because the defendant signed his name to the contract as president of the company, he was not relieved from personal liability, if personal liability existed without that designation, neither by adding such designation did the company become bound. No doubt that is correct. contract is with the directors of the bridge company, and it is argued that using the term directors is a mere personal designation, and that it may be proved who the directors were, and thus they may be rendered personally responsible. If the corporation were not liable upon a contract with the

directors of the corporation, there might be force in the argument. We find that the affairs of the company are to be managed by five directors, and I have no doubt, the contract being with the directors, the corporation is liable upon it, for the corporation was complete, and the directors had authority to bind it, and the contract being with the directors an intention is plainly evinced to bind it. This being so, the next question is, whether the defendant or any or all of the directors are to be considered personally responsible as well as the corporation. I see no such intention evinced, and I think it would be stretching the construction of the instrument beyond reason, to say that because the contract merely expresses it to be with the directors of an incorporated company, therefere the directors at the time the contract was entered into were personally responsible. The directors are a fluctuating body, and one set may have approved of tenders for the work, and before the contract be signed another set may be elected. A greater confusion still might arise if the use of the mere term directors is to render them personally liable, for then the representatives must also be liable. look upon the body of directors in the light of being in the nature of agents for the management of the company's affairs, and that the contract with the directors is in fact by them upon behalf of the company. The plaintiff knows with whom he is contracting, and he knows that he is dealing with the corporation; and, applying the same principle which would govern in the case of agency in such case, he could not sue the agent, unless the contract evinced an intention to bind the agent as well as the principal. I think the ruling of the learned judge was quite right, and that the verdict should not be disturbed.

Rule discharged. (a)

⁽a) The Chief Justice was absent during last term, when this rule was argued, and therefore gave no judgment.

LIGHT V. WOODSTOCK AND LAKE ERIE RAILWAY AND HARBOUR COMPANY.

Pleading-Release delivered as escrow-Onus probandi.

To an action for work and labour, defendants pleaded a release by agreement under seal, making profert. The plaintiff replied that the agreement was delivered to a third party as an escrow, on condition that it should be void on default made by plaintiff in payment of £200 by a certain day; that defendant did not pay, whereby the agreement became void, and so was not the plaintiff's deed.

Held, that the defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery

as part of his case.

Assumpsit for work and labour, and on other common counts. Pleas-first, non-assumpsit; second, payment; third, as to the work and labour, &c., that after the accruing of the said causes of action, and before, &c., to wit, on the 20th of July, 1854, the plaintiff by certain articles of agreement under seal. made between the plaintiff, amongst others, of the one part, and H. C. B., H. de B., E. D., A. A. F., J. H. C., A. T., and the defendants, of the other part (making profert) the plaintiff. for the consideration therein mentioned, did release, discharge and for ever quit-claim the defendants, of and from all moneys, &c., &c., which the plaintiff then had, or thereafter might have, against the defendants, with respect to the plaintiff's salary, up to the date of the agreement-Averment of the identity of demand in this action with the demand released; and so the defendants in fact say that the plaintiff, modo et forma, did release to the defendants all the said causes and rights of action in the introductory part of the plea mentioned. There were other pleas, not requiring notice. To the third plea the plaintiff replied, that the articles of agreement in that plea mentioned were delivered to one S. C. as an escrow, to be kept by him on this condition, that if the defendants did not, on or before the 27th of February, 1855, pay to the plaintiff £200, the said agreement should be annulled and redelivered to the plaintiff; but if £200 were so paid, the said agreement should stand against the plaintiff in full force:-that the defendant did not pay the £200, which remains wholly unpaid, whereby the said articles of agreement and the supposed release became annulled and vacated; and so the plaintiff says the said articles are not and is not his deed-concluding to the country.

At the trial, in May last, at Toronto, before Macaulay, C.J.,

the plaintiff gave evidence of his services and their value. The defendants, in cross-examination, proved and put in a letter, in which the plaintiff offered to accept £100. After the plaintiff's case was closed, the defendants' counsel objected that the burden of proof on the issue on the third plea was on the plaintiff, to shew that the deed of release was conditional on defendants paying £200. The learned Chief Justice overruled the objection, and the plaintiff had a verdict for £200.

Eccles moved to set it aside for misdirection, and for excessive damages. In support of the first point he cited Doe Baggaley v. Hares, 4 B. & Ad. 435.

Cur. adv. vult.

DRAPER, J., delivered the judgment of the court.

It appears to us clear that the defendants were called upon by the replication to prove the execution of the deed. Delivery is an essential part of the execution, and that at least is put in issue by the replication. Johnson v. Baker (4 B. & Al. 440) is something like this case, and the course taken at the trial of that cause seems in accordance with the view we have expressed, though there is, it is true, non est factum was pleaded, as well as the delivery of the deed subject to a condition, et sic non est factum. Murray v. The Earl of Stair (2 B. & C. 82) more clearly resembles this case. There there were only two pleas, both raising the question of a conditional delivery. The plaintiff called the subscribing witness to prove the bond.

We can see no ground for holding that when the defendants assert that they are released by and because of the execution of certain articles of agreement by the plaintiff, and the plaintiff denies those articles to be his deed, because he never delivered it, the affirmative of the issue is not that the plaintiff executed it completely, and as the defendant makes that assertion that he should prove it by the subscribing witness.—See observations of Lord Denman, C. J., in Sowell v. Champion (6 A. & E. 418). We do not assent to Mr. Eccles's proposition, that the defendants' plea, containing a profert in curiam, furnishes primâ facie evidence of delivery. It was not produced at the trial at all; and the effect of Mr. Eccles's argu-

ment would be, that unless the plaintiff had given notice to produce the deed, which the defendants pleaded as a then discharge from liability, and then called evidence to shew it was not executed, the defendant, without producing or proving the deed, and although its delivery was in issue, would be entitled to a verdict. We think there should be no rule.

Rule refused.

WILSON AND THE MUNICIPAL COUNCIL OF THE COUNTY OF ELGIN.

By-law-Rate of interest-16 Vic. ch. 80.

Municipal corporations cannot by by-law raise money at a rate of interest exceeding six per cent.

In Hilary term C. Robinson obtained a rule nisi, returnable on the first day of this term, calling on the Municipal Council of the County of Elgin to shew cause why the by-law passed on the 10th of May, 1854, to raise by loan £7000 and interest should not be quashed, wholly or in part, because-1, The by-law provides for the payment of interest on the loan at a rate exceeding the legal rate of interest. 2, The amount required to be raised annually, as a special rate for the payment of such loan, and the interest thereof, and the annual rate in the pound required as a special rate for the payment of interest on the loan, and for creation of a sinking fund to pay the principal thereof, are not either of them recited in such by-law; or they are untruly recited therein; and the sums required to be levied, and the annual rate in the pound imposed, are excessive, and more than sufficient for the purposes of the by-law.

The rule was obtained on producing a copy of the by-law verified in the usual manner, and an affidavit of the complainant shewing his right to apply to quash the by-law.

In this term A. Macdonald shewed cause. He contended that the by-law did not direct that the loan should be raised at a rate of eight per cent. interest, but if it did, still it would only be void for the excess of interest over six per cent. That the rates imposed appearing in the schedule do not, if they authorize the raising somewhat more than is strictly

necessary—i.e. more than each annual instalment and six per cent. interest—therefore make the by-law void—Watts v. Salter (20 L. J. C. P. 43): that the statute 16 Vic., ch. 80, sec. 3, saves the by-law, except as to the two per cent. over legal interest—Nourse v. Goodeve, 12 U. C. R. 198.

C. Robinson, contra, argued that the by-law shewed clearly that eight per cent. was intended and authorized to be paid as interest; that the 16 Vic., ch. 80 did not apply, for this was no contract; that the by-lay was contrary to public policy, and injurious to public credit, and opened the door to fraud. He cited Grierson v. The Municipal Council of Ontario, 9 U. C. R. 623. He objected also that the rate was different in each year, referring to Sells and the Municipality of St. Thomas, 3 C. P. 286.

DRAPER, J., delivered the judgment of the court.

Before the statute 16 Vic., ch. 80, there can be no doubt but that the Municipal Council could not, by by-law or otherwise, authorize or contract any loan, debt or other liability, at a greater interest than six per cent.; and this by-law is clearly bad unless that statute saves it, for it says, "we authorize a loan and impose a tax to pay it with interest, as to which we are ready to pay eight per cent., though we will not pay more; and we make provision for paying that loan with interest not to exceed eight per cent.," which means with eight per cent.

In our opinion the statute 16 Vic. was not intended to have the operation contended for. The case does not come within its strict letter, for a by-law is not "a contract for the loan or forbearance of money," though it may be the authority for making a contract. The fourth section of that act is not opposed to this view, though it excepts from its enactments banks, insurance companies and corporations or associations theretofore "authorized by law to lend or borrow money at the rate of interest higher than six per cent. per annum." These municipal corporations clearly do not fall within that exception.

We think also that there is great force in Mr. Robinson's suggestion, that it is contrary to public policy, and likely to

be injurious to the credit of the debentures which these municipal corporations are authorized to issue, if they could on the face of them be made payable with a higher rate of interest than could under the third section be legally enforced against them.

In the Consolidated Municipal Loan Fund Act passed during the same session, 16 Vic., ch. 22., sec. 3, sub-sec. 5, it is expressly enacted, that the debentures which the Receiver General may issue on the credit of this fund shall in no case bear interest at a greater rate than six per cent. We can hardly think the Legislature intended to restrict the rate of interest for money to be raised on the credit of this fund for such municipal purposes as are set forth in the second section of that statute, and yet to enable the municipal corporations to raise money, either for the same or other purposes, on their own debentures, at a higher rate of interest.

We think the by-law should be quashed, as this objection vitiates it throughout.

Rule absolute.

CALCUTT V. RUTTAN.

Arrest—Bail to the sheriff—16 Vic. ch. 175, secs. 7, 8—Construction of—
10 and 11 Vic. ch. 15.

The sheriff cannot of his own mere motion allow a prisoner charged in execution, and in his custody, the benefit of the limits.

A debtor who is admitted to the limits on giving a bond to the sheriff, under 16 Vic., ch. 175, is bound to enter into and file the recognizance required by 10 & 11 Vic., ch. 15, within a month from the execution of such bond. If he does not, the sheriff must recommit him to close custody at the expiration of the month, or he will be liable as for an escape.

If the certificate of the filing such recognizance, &c., be not delivered to the sheriff within a month, the bond to him is forfeited.

Semble, that it is obligatory on the sheriff to take a bond under 15 Vic., if the securities are sufficient.

This was an action against the sheriff of Northumberland and Durham; the first count, on which all turned, being for a voluntary escape of J. N., on a Ca. Sa. The second count was for not arresting.

The second plea pleaded to the first count stated, that after J. N. had been arrested by the defendant at the suit of the plaintiff, the said J. N. being entitled to the benefit of the gaol limits, the defendant permitted him to go and remain upon

such limits, under and by virtue of the Ca. Sa., as in the second count mentioned; absque hoc, that the defendant ever did, since the arrest of J. N., as in the second count, permit him to escape or go at large out of his custody, as sheriff of, &c., or that the said J. N. ever did, since his arrest, escape or go at large otherwise or further than the defendant hath set forth in this plea; verification.

Demurrer—That it doth not appear on what security, or on what terms, if any, J. N. was at large upon the limits, nor is the plea any answer to the first count.

The third plea stated, that after J. N. was arrested, and while he was in custody on the Ca. Sa., the said J. N. being entitled to the benefit of the gaol limits, under 10 & 11 Vic., ch. 15, the defendant took bail from the said J. N., in pursuance of sec. 7 of 16 Vic., ch. 175, that the said J. N. would not depart the gaol limits of, &c., and the said J. N. and two good and sufficient sureties, to wit, W. N., and A. B., by their writing obligatory, sealed, &c., acknowledged themselves to to be held, &c., to defendant, as sheriff, &c., in the penal sum of 3621. 10s. (being double the amount for which J. N. was arrested), with a condition that if J. N., should remain within and not depart from the limits assigned, &c., and should forthwith surrender himself for recommittal, upon a rule or order for that purpose being made, and should obey, &c., all rules and orders relative to the said J. N., then the bond should be void; and upon this bond being entered into the defendant permitted J. N. to go upon the limits. Averment, that J. N. has never departed from such limits, but still remain thereon, and hath in all respects kept the condition of the bond, absque hoc that the defendant since the arrest has permitted J. N. to escape, &c., or that J. N. has escaped, &c., otherwise or further than stated in this plea.

Replication, after over of the condition, which was read, "that if the said J. N. shall remain within, and shall not depart from or without the limits assigned, &c., and shall forthwith surrender himself to the custody of such sheriff for recommittal to close custody, upon a rule of court or judge's order for that purpose being made, and shall in other respects observe and obey all rules of court and judges' orders in relation to

such party; or if the sureties do and shall at all times save harmless and keep indemnified the said sheriff for all losses, &c., which he shall or may bear, sustain or be put to, and from all actions and suits which now are or shall hereafter be brought, &c., rightfully or wrongfully, against the sheriff, on account of allowing the said J. N. to go at large upon the limits, then," &c.:—that, though true it is such writing obligatory was made, yet the plaintiff says that the period of one month from the time of the execution of the said writing obligatory had elapsed long before the commencement of this suit, and from the expiration of one month up to the commencement of this suit, the said J. N. was at large on the limits, and out of close custody: verification.

Demurrer—That the replication treats the defendant as a trespasser ab initio, because J. N. was at large on the limits after the expiration of a month from the making of the bond, otherwise the plaintiff should have newly assigned, admitting the plea and stating precisely his cause of action; that the replication is no answer at law to the plea.

The fourth plea was similar to the third, to the end of the condition of the bond, and then stated that J. N. did never in anywise break the condition, and did afterwards, to wit, on, &c., according to the provisions of the 5th section of 10 & 11 Vic., ch. 15, duly enter into the recognizance of bail thereby directed, and produce to the defendant a certificate from the Clerk of the Crown that such recognizance and affidavit of the justification thereof had been filed: verification.

Replication,—admitting the bond and the certificate—That one month from the execution of the bond had elapsed long before the recognizance of bail was entered into, and the certificate procured or produced to defendant, and that for the space of, to wit, ten days from the expiration of such period of one month to the time of the production of the certificate to the defendant, J. N. was at large within the limits, and out of close custody: verification.

Demurrer, on the same ground as to the replication to the third plea; and further, that the certificate, still being in full force, is a discharge to the defendant from all responsibility respecting J. N. after his admission to the limits; that the

plaintiff did not object to the taking of the recognizance or affidavit of justification, or except to the sufficiency of the bail.

The fifth plea stated, that the plaintiff was not in any manner damnified or injured by the grievances in the first count mentioned, and by the supposed default of the defendant: concluding to the country.

Demurrer—That the fifth plea is no answer, and sets up no matter of defence.

Vankoughnet, Q. C., for the demurrer.—Armour, contra, cited Wragg v. Jarvis, 4 O. S. 317; Griffiths v. Eyles, 1 B. & P. 413; Chambers v. Jones, 11 East. 408; York &c. R. W. Co. v. The Queen, 1 E. & B. 858; The Great Western R. W. Co. v. The Queen, Ib. 874.

DRAPER, J.—It is not very easy, from the various enactments which, both before and since the Union, have been in force in Upper Canada, satisfactorily to deduce the precise intention of the Legislature, so as to have a clear guiding principle to assist us in coming to a conclusion upon doubtful questions of construction upon those acts. The right of the creditor to arrest his debtor before obtaining judgment has been maintained, varying from time to time the affidavit on which the writ should issue; and the right of the creditor to charge his debtor in execution under certain circumstances has also been upheld, though taken away for a short period by 7 Vic. ch. 31, which again was repealed by 8 Vic. ch. 48. But different acts have from time to time been passed, some for the relief of the party arrested, others giving the creditor means of compelling a disclosure of the possession, or right to possession, or the disposal of any real and personal property by the debtor. We find provision made for the relief of indigent debtors by a weekly allowance, extended to debtors in custody on mesne process.—See 45 Geo. III. ch. 7; 2 Geo. IV. ch. 8; 4 Wm. IV. ch. 3. By other statutes provision is made for the discharge of debtors owing certain sums from custody after a fixed period of imprisonment (5 Wm. IV. ch. 3; 4 Wm. IV. chapters 3 & 5); and a protection against imprisonment for debt altogether, when the debtor has made a full and unreserved surrender of his property (8 Vic. ch. 48); while

5 Wm. IV. ch. 3, sec. 7, provided for the recommittal of a debtor fraudulently obtaining his discharge; and the following section of the same statute made the assignment, &c., of property to defraud creditors a misdemeanor, punishable by fine and imprisonment. The act of 10 & 11 Vic. ch. 15, secs. 3 & 4, extended the right to a discharge to all debtors charged in execution, without reference to the amount of the debt, on their compliance with certain conditions. With the same view of mitigating imprisonment for debt, limits were assigned to the different gaols in Upper Canada. The first of the statutes for this purpose was the 2nd Geo. IV. ch. 6, which was repealed and other provisions substituted by 11 Geo. IV. ch. 3, which act is still in force, though by 10 & 11 Vic. ch. 15, the limits of each gaol were extended to the whole of the district within which such gaol is situated. It provides that each shall be lawful for any debtor confined in gaol to be and remain at any part or place within such limits, without subjecting the sheriff to any action or suit for escape "from such gaol limits" (which is an obvious error, for so long as the party remained on the limits, he could not subject the sheriff to an action of escape from them. The first act (2 Geo. IV.) has the words "for escape from such gaol or limits," and shews what was meant, though the necessity of the two last words is not very apparent); provided, however, that it shall not be incumbent on the sheriff to allow any debtor the use of the limits, unless such debtor furnish good and satisfactory security that he shall not at any time during his confinement go or remove beyond such limits. The same act (sec. 10) provided that the creditor might tender the like interrogatotories to the debtor residing on the limits as might be tendered to an insolvent debtor-i. e., touching or concerning or for the purpose of discovering any property or credits which the debtor might have, or which he might be suspected of having secreted or fraudulently parted with; and if the debtor do not answer the interrogatories within twenty days next after service of a copy on him, he shall be recommitted. section of 10 & 11 Vic. ch. 15, altered the nature of the security to be given, by providing that all persons who were by law entitled to the benefit of the gaol limits, and were

desirous of obtaining the same, might enter into a recognizance of bail or bail-piece with two sufficient sureties, under a condition that such party should remain and abide within the limits, and not depart therefrom unless released by due course of law, and should obey all notices, orders and rules of court touching their remaining on the limits, or being remanded to close custody; that the sureties should justify by affidavit in double the amount for which the party was arrested; that the recognizance should be filed in the proper office, and notice be given to the plaintiff; and upon production to the sheriff of a certificate from the clerk of the court that such recognizance and affidavit have been filed in his office, it shall be lawful for the sheriff to admit the arrested party to the limits, and the sheriff shall be discharged from all responsibility respecting such party after such admission to the limits, unless he be again committed to close custody. By rules which the courts are authorized to make, the bail must be duly allowed before the clerk issues the certificate. It seems to have been one object of this enactment to relieve the sheriff from the responsibility of deciding upon the sufficiency of the security tendered by the party desirous of obtaining the limits, which, under the former law, when he had to take a bond to himself, he was obliged to assume. By entering into a recognizance, the bail being also compelled to justify, and being liable to be excepted to, were not allowed until their sufficiency was reasonably established, and the duty of the sheriff was merely ministerial, his responsibility being limited to the safe custody of the debtor until admitted to the limits, or again after being remanded. Under this new procedure also the creditor became promptly aware that his debtor was on the limits. and was consequently liable to answer interrogatories under 11 Geo. IV. ch. 3.

The 16 Vic. ch. 175, sec. 7, made a change in the state of things, partially recurring to the former law. It recited that it frequently happened that parties in custody entitled to the benefit of the gaol limits were compelled to go to prison until a rule or order for the allowance of bail entered into by them shall have been made; and provided for remedy thereof, that when any such party should be arrested and in custody of the

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sheriff, it should be lawful for the sheriff to take from him a bond with two or more sufficient sureties, for double the amount for which the party has been arrested, conditioned that such party shall not depart the gaol limits, and shall forthwith surrender himself to the sheriff, on a rule of court or judge's order for that purpose being made, and shall in other respects obey all rules of court or judge's orders in relation to such party; and upon the receipt of such bond, the sheriff shall forthwith allow the party the benefits of the gaol limits. The eighth section enacts, that if any defendant, after giving such bond to the sheriff, shall deliver to the sheriff the certificate that the recognizance and affidavit of justification (already referred to) have been duly filed, such defendant and his sureties shall thereupon be released and discharged from all damages for any breach of the condition of the bond occurring after the date of the certificate; provided that if such certificate be not produced within one month from the execution of the bond, it shall be lawful for the sheriff to commit the defendant to close custody, there to remain, as if no such bond had been given. The twelfth section provides, that the party arrested shall, after the execution of the bond, and admittance to the limits under the same, be subject to interrogatories, committal to close custody, and recommittal, with all other privileges and liabilities, in like manner as if he had been on the limits on a recognizance.

It is not altogether unimportant to bear in mind, that no person can be charged on execution unless the plaintiff has before judgment issued a capias against him; to do which, he must have sworn that he has reason to believe, and verily does believe, that the defendant was about to leave Upper Canada with intent and design to defraud him; or unless the plaintiff after judgment makes a similar affidavit, or in lieu thereof an affidavit that he hath reason to believe the defendant hath parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution, which would be a misdemeanor. If a debtor so charged gets the benefit of the limits, it is not, I think, too much to assume that the creditor should have early notification, that he may administer interrogatories, which notice he

is sure to get, is a recognizance under 10 & 11 Vic. is entered into, while of the bond he has no notice at all.

No debtor, therefore, can be taken upon a Ca. Sa., who is not accused, on the oath of the creditor, his servant or agent, of a fraudulent intent or act in relation to the payment of the debt or the disposal of his property; nor can he be detained as a prisoner if he can establish his insolvency, and answer such interrogatories as may be put to him respecting his effects, or his conduct in regard to them and to his business, in such a manner as will be satisfactory to a judge.

The second plea raises the question, whether a sheriff can, of his own mere motion, allow a prisoner charged in execution and in his custody the benefit of the limits. Whatever construction might have been put upon the 11 Geo. IV. ch. 3, it could not govern us now. I am not aware that this question has been directly adjudicated under that act; but the 10 & 11 Vic. ch. 15, clearly leaves no such discretion in the sheriff, and under that act the plea could not be sustained; for, however general the right may be that a debtor in execution has to be admitted to the limits, that right is clearly made contingent on his filing the recognizance of bail and affidavit of justification, and serving the certificate of the clerk on the sheriff. The only remaining question on this plea is, whether the latter act (16 Vic.) makes any difference as to the sheriff's power or authority. As, in disposing of the demurrers to the replications to the third and fourth pleas, I must more particularly consider this act, I shall content myself with saying that I do not think this act so far changes the sheriff's position, and that in my opinion the plaintiff is entitled to judgment on the demurrer to the second plea; besides which there is a clerical error in this plea, which, though pleaded to the first count, in the traverse, answers only the second.

The questions arising on the demurrers to the replications appear to be, first, whether the debtor who obtains the limits by giving a bond to the sheriff, is not bound to enter into and file the recognizance, &c., required by the 10 and 11 Vic., within a month from the execution of the bond; secondly, whether, if he does not, it is not the sheriff s duty to recommit

him to close custody at the expiration of a month, or he will be liable as for an escape; thindly, whether a new assignment is rendered necessary by the third plea; fourthly, whether the fourth plea, which shews a recognizance entered into, but neither avers it to have been done within one month from the execution of the bond, nor even before the commencement of the suit, is answered by asserting that more than the month elapsed before the recognizance was entered into, without new assigning.

It certainly would have been more natural if the condition of the bond authorized by the 16 Vic. had, in analogy with the bail bond to the sheriff under the old practice, required the defendant and his sureties to procure the recognizance to be entered into, &c., within a month, and that in the meantime, and until it was entered into, the defendant should not depart the gaol limits. The omision to require this, and the general mandatory character of the direction in the seventh section, that upon the receipt of such bond the sheriff shall forthwith allow such defendant the benefit of the limits, might lead to the conclusion that a bond to the sheriff might be substituted for the recognizance required by the former act, and when given would make it unnecessary to enter into the other. The eighth section, however, prohibits this conclusion, for it makes the delivery of the certificate of the filing of the recognizance, &c., to the sheriff a discharge from further liability on the bond, though it omits to say that such recognizance should be entered into within the month; and it ends by providing that if the certificate be not delivered to the sheriff within a month from the execution of the bond, it shall be lawful for the sheriff to commit the defendant to close custody. This, taken together with the recital at the beginning of the seventh section, quite satisfies me that the Legislature did not intend to substitute the bond wholly for the recognizance, but only temporarily, to prevent the absolute necessity of the debtor being kept in close custody until the bail by recognizance could be perfected and the certificate obtained. If, then, the debtor still had to perfect bail by recognizance, he must do it within a reasonable time, if the time had not been fixed by the act; but when the act names

a time, at the expiration of which it shall be lawful for the sheriff, ex mero motû, to commit him to close custody, I look on that as in fact limiting the time within which the certificate should be obtained and delivered to the sheriff.

But though the bond may be forfeited for not entering into the recognizance within the month, the question still remains, whether the sheriff be liable to an action for an escape, for allowing the debtor to remain on the limits after the month has expired, no certificate of the recognizance having been delivered to him. I have felt rather more difficulty on this point: but on the best consideration, I am of opinion he is. Wraggie v. Jarvis (4 O. S. 317) decided that the sheriff was guilty of an escape, for allowing a debtor who had been duly admitted to the limits to remain at large upon them after an order delivered to the sheriff for the debtor's recommittal to close custody. Was it the sheriff's duty here to have recommitted? The taking of the bond, so far as regards the sufficiency of the sureties, is a matter on which the sheriff has a discretion, though having taken it, he must allow the debtor the benefit of the limits. The creditor may in his election take an assignment of that bond, and wherever the sheriff may maintain an action on it, so may the assignee. It may be going too far to say that the authority given to the sheriff to recommit on failure to deliver the certificate to him within a month is obligatory on him, but it clearly, I think, shews that the nondelivery of the certificate within the month must be considered as a forfeiture of the bond; for it would be in the highest degree-inconsistent to make the right to the limits absolute on giving a sufficient bond to the sheriff, and to permit the sheriff to deprive the party of that right while the bond remained in full force, while the condition was unbroken, and while nothing had happened to diminish the sufficiency of the sureties. As it appears to me, the bond is forfeited by the nondelivery of the certificate, which is a condition precedent to the right to the limits for more than a month from the execution of the bond, and if so the sheriff is guilty of a negligent escape at least, and should instead of denying the escape altogether, plead what would be equivalent to a recapture or fresh pursuit; and

it is in this view, I apprehend, that the filing the recognizance and delivering the certificate has been pleaded, though insufficiently, as it appears to me, to raise that question, because it treats the fact that the recognizance was at some time entered into, without either shewing it to be within the month or before the action brought, as an answer, which, as at present advised, I think it is not, and that so far both these replications are good.

Then, as to the former objection: each of these pleas expressly traverses any escape, unless the facts stated in the inducement to the traverse amount to one. The plaintiff alleges a fact additional to those contained in the inducement, in effect admitting them to be true, but shewing another circumstance, which he insists makes the sheriff liable for an escape. I think this is sufficient. It points out distinctly on what the plaintiff relies as an escape, which is his cause of action. The defendant might take issue on that fact, or demur in law: either way, the real question between the parties is brought up.

I am, therefore, of opinion that the plaintiff is entitled to judgment on the demurrer to these replications.

No attempt was made in argument to sustain the fifth plea, which admits the wrong complained of, and only denies the damage resulting from it. This is confessing without avoiding, and clearly bad.

Burns, J.—The question raised by these demurrers is a very important one; and the conclusion I have arrived at—after much doubt, however, how the two statutes, 10 & 11 Vic. ch. 15, and 16 Vic. ch. 175, secs. 7 & 8 should be construed—is, that judgment must be for the plaintiff. In order to get a clear view of what the Legislature intended in the provisions of the latter statute respecting a bond being given to the sheriff, it is necessary to get a clear view of what was intended by the statute 10 & 11 Vic., ch. 15. It will be seen, under the provisions of this statute, that the bond formerly given to the sheriff, that the execution debtor would remain upon the limits, and not subject the sheriff to an action for an escape, was abolished, and a recognizance of bail

substituted. In consequeuce of the provision contained, that the sheriff should be discharged from all responsibility in case of the debtor being admitted to the limits, I have been hitherto induced to think that the substitution of the recognizance for the bond to the sheriff was enacted in case of sheriffs. Upon reconsideration I do not feel, that though it is susceptible of that view, yet that the Legislature contemplated that alone. The preamble recites that the law relating to imprisonment for debt required amendment, and that it was desirable to afford additional means for the discovery and application of the property and effects of judgment debtors in certain cases. In the taking of the bond to the sheriff to abide upon the limits, the sheriff exercised his own judgment as to the security—the plaintiff in the action had no voice whatever. Under the alteration the plaintiff must be called upon to shew cause why the defendant should not be admitted to the limits on the recognizance, and he may except to the bail. The recognizance provided also for the defendant obeying all notices, orders and rules of court, touching the debtor remaining or continuing upon the limits, or being remanded or ordered to close custody. These provisions formed no part of the condition of the bond to the sheriff. The provision that the sheriff shall, upon the production to him of the certificate that the recognizance has been allowed, be discharged from responsibility, seems but the natural consequence of his admitting the debtor to the benefit of the limits. Still, however, being in custody upon the writ, and therefore to the extent of his being so admitted to the limits, the certificate of allowance, quoad the sheriff, may be said to be in the nature of a supersedeas of close imprisonment. On the whole, therefore, it seems to me to a certain extent this statute was intended to be more rigorous upon execution debtors. It is difficult, however, to say in what respect the Legislature considered its provisions more stringent than the law was before, for independent of the provisions I have mentioned, the act does not seem to provide additional means for discovery or application of a debtor's property. I feel convinced, however, one object of the Legislature was, that the execution debtor should only

be admitted to the limits through the knowledge of, and by means of the plaintiff being a party to the proceeding under which the debtor was admitted to the limits, which certainly was a material alteration from the law authorizing the sheriff to take the bond. This being so, then the question is, what is the effect of 16 Vic. ch. 175, secs. 7 & 8? If the intention of the Legislature was to restore the old law to the extent of allowing sheriffs to take a bond, and that the bond should be equivalent in all respects to the recognizance, there was no occasion then to have inserted the proviso about the defendant procuring and delivering to the sheriff the certificate within a month of the execution. Neither is there any sense in the making of a proviso for the certificate being furnished within the month, if it be entirely optional with the sheriff to take the bond or not. I do not consider it is optional. I think the sheriff would be bound to accept a good and sufficient bond if tendered to him. I do not think the effect of the eighth section is, to leave it optional with the sheriff to substitute a bond for the recognizance; for if so, then to that extent it would operate as a repeal of the 10 & 11 Vic. ch. 15. I think the Legislature intended to leave that act untouched, except so far as to provide a remedy and means to prevent debtors being committed to. prison until the allowance of recognizance could be perfected The plaintiff in the suit was to retain all his rights given by the 10 & 11 Vic. ch. 15, and the 16 Vic. ch. 175, sec. 8, was to favour the debtor to the extent of thirty days to have the rec ognizance perfected.

Judgment for plaintiff on demurrer.

HAMER V. LAING.

Ejectment—14 & 15 Vic. ch. 114, sec. 12, construction of—Double value— Mesne profits—Pleading.

First count, debt on the statute for double value, claiming £40; Second count, for use and occupation, claiming £20. The defendant pleaded, secondly, that after the passing of the 14 & 15 Vic. ch. 114, the plaintiff impleaded the defendant in an action of ejectment for the same premises in the declaration mentioned, &c., in which action the jury were sworn as well to try the issue jointly as to assess the damages to which the plaintiff might be entitled for the use and occupation of said premises and a verdict was rendered for the plaintiff, as and for damages for the use and occupation of said premises, &c., &c.; thirdly, to the whole declaration, as to £20, parcel, &c., the same plea.

Hell, on demurrer**, both pleas bad, as being no answer to the first count,

Held, on demurrer, both pleas bad, as being no answer to the first count, and for not shewing that notice of claim to substantial damages was given, or that judgment had been entered, or that the recovery was for the same claim; that the third plea was bad also, for not shewing to what

£20 it was pleaded.

Semble, per Burns, J., that a plaintiff in ejectment not having proceeded for substantial damages, is precluded from recovering them in a subsequent action.

DEBT, on the statute 4 Geo. II. ch. 28, for double the yearly value of premises held over by the defendant after the expiration of the term granted him by the plaintiff, and after notice from the plaintiff to quit, claiming £40. Second count, in debt for use and occupation, claiming £20.

Plea (second), to the whole declaration—That after the passing of the statute 14 & 15 Vic. ch. 114, to wit, on, &c., the plaintiff impleaded the defendant, in the Court of Queen's Bench, at Toronto, in an action of ejectment, for the same premises in the declaration mentioned, as those theretofore occupied by the defendant; and in such action issue was joined, and a jury was afterwards, to wit, on, &c., empannelled to try the said cause; and on that occasion the jury were sworn as well to try the said issue as to assess the damages to which the plaintiff might be entitled for the use, occupation, and enjoyment of said premises; and the said jury afterwards, and before the commencement of this suit, to wit, on, &c., rendered a verdict for the plaintiff, as and for damages to which the plaintiff was entitled for the use and occupation of said premises, as by the record and proceedings still remaining in the said Court of Queen's Bench more fully appears, which said proceedings and verdict are still in full force and

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unreversed; and this defendant is ready to verify by the record.

Third plea to the whole action—As to £20, parcel, &c., actio non, pleading verbatim the matters set out in the preceding plea; offer of verification by the record; prayer of judgment.

Both these pleas were demurred to, the causes assigned being, as to the second, that it does not appear that the use and occupation recovered for in the ejectment are identical with that sued for in the first count; that the cause of action in the first count is statutory, for which a remedy could not be obtained in the action of ejectment; that the plea professes to answer the whole cause of action, while it is only an answer to the second count, if it answers anything; that it is not alleged that judgment was recovered in said action; that it is not shewn that the plaintiff gave the notice required by the statute, to entitle him to more than nominal damages; that the conclusion of verification by the record is wrong.

To the third plea, that it is uncertain whether the £20 pleaded to is parcel of the debt claimed in the first or in the second count; that the plaintiff can take no certain issue thereon; that the plea is no answer to the first count, for it is not shewn that judgment is entered in the ejectment; that it is not shewn that the plaintiff gave any notice in the ejectment suit to entitle him to more than nominal damages; that the conclusion is wrong in offering to verify by the record.

M. C. Cameron for the demurrer; Hagarty, Q. C., contra. The authorities cited are referred to in the judgments.

DRAPER, J.—The clause in the Ejectment Act (14 & 15 Vic. ch. 114) on which the defendant relies is the twelfth: "That in all cases wherein a jury shall be empannelled to try any suit brought to recover possession of any property, the jury shall also be sworn to assess any damages to which the plaintiff may be entitled for the use, occupation, or enjoyment of the premises in dispute by the party or parties defending the suit, and any damage, waste, or spoil occasioned to such premises by such party or parties; and the jury shall assess such damages as may appear just according to the

evidence; Provided always, nevertheless, that in all cases where substantial damages are demanded, the party or parties seeking to recover the same shall, with the original summons, serve the defendant or defendants, and the person in occupation if (any), with a notice to the following effect, and that none but nominal damages shall be assessed unless such notice shall be given." The form of notice is then given.

I think, at present, both pleas bad, for not averring that the plaintiff gave notice of a claim for substantial damages, and I am strongly inclined to think more than that would be necessary to make the pleas a good bar. They are in the nature of a judgment recovered, though it is objected they do not show that judgment has in fact been entered. In order to make the pleas a good bar, they should shew a recovery for the very same identical thing now sued for, in which particular they are both defective. They merely shew that there was an occasion on which possibly the plaintiff might have recovered as damages in ejectment the the sum he now sues for as a debt, but they stop short of shewing that the state of facts was such that the plaintiff certainly could have recovered, and that he offered any evidence, or that any question of his right so to recover was submitted to the jury. At all events I think the pleas bad as a defence to the first count, for the plaintiff could not have recovered the double value given by the statute as damages in the ejectment (See Soulsby v. Neving, 9 East, 310); and the third plea is bad for not shewing to what £20, parcel of the demand in the first count or second count, it is pleaded. It cannot be to a sum of £20 demanded in each count, for it cannot cover more than £20 altogether, and on these pleadings we must assume the plaintiff seeks to recover for a separate cause of action in each count.

For these reasons, and without adverting to other objections, which might be found tenable, I think there should be judgment for the plaintiff on the demurrer.

Burns, J.—The damages which the jury are to be sworn to assess in an action of ejectment, are for the use, occupation and enjoyment of the premises, and any damage, waste or spoil occasioned to the premises. The claim for use, occupa-

tion or enjoyment, would, I apprehend, be confined as in the ordinary action for mesne profits, and that would be the annual value, or actual rent, in case the defendant were receiving rent more than the annual value. In this case the action is for double value given by 4 Geo. II. ch. 28, against a tenant overholding after the expiration of his term. case of Soulsby v. Neving (9 East 310) decides that the action of debt for double value may be sustained, notwithstanding the landlord has treated the tenant as a trespasser by bringing an action of ejectment against him. I understand our Ejectment Act to mean that such damages as would be recoverable in an action for mesne profits should be recoverable provided the plaintiff has given the notice prescribed. The action of debt given by the 4 Geo. II. ch. 28, for double value, is not, I think, affected by our act. It may be a question whether, under our Ejectment Act, if substantial damages are sought to be recovered, it is not incumbent on the plaintiff to give the notice, and if he does not do so, whether it should not be held that he had waived all claim to damages. It was not necessary to decide the point expressly in Curtis v. Jarvis (10 U. C. R. 466), nor is it necessary to do so now. The inclination of my mind, however, is, that the object of the Legislature was to make it obligatory to dispose of the two questions, both of title and damages, instead of the former proceeding by a subsequent action for damages after the title should be established. If that be so, I am not prepared to say these pleas may not be sufficient in omitting to state that a notice was given; for if the effect of the statute be to compel a plaintiff to make a claim, or that if he does not he is barred from making it afterwards, then it may be sufficient merely to say that an ejectment was brought for the same identical premises, and the plaintiff recovered. It is not necessary, however, to decide this case upon that view, I think, for the action of debt for double value is given by 4 Geo. II. ch. 28, against an overholding tenant, irrespective of whether an action of ejectment be brought or not against him. For that reason I think the action on the first count is sustainable, notwithstanding whatever the effect of our Ejectment Act may be. The third plea is bad for one of the reasons assigned-viz., that it is

uncertain whether it is pleaded in bar of £20 in the first count, which action is, I think, clearly sustainable, or whether it is pleaded as bar of £20 claimed in the second count (a).

Judgment for the plaintiff on demurrer (b).

LAMPKIN V. THE WESTERN ASSURANCE COMPANY.

Policy of insurance-Conditions-Waiver.

One of the conditions of a policy of insurance was that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition; and relied upon an alleged conversation between his agent and the president of the company. Held, that the condition could not be so waived, and that such evidence was properly rejected.

Held, also, that the letter set out below contained no evidence of a waiver

of this condition.

COVENANT on a policy of assurance on merchandize in the plaintiff's store; amount insured £250; allegation of total loss by fire.

In the first count, the plaintiff declared, setting out in full, as is usual, the conditions of the policy, and averring an exact compliance on his part with all the conditions, among them the ninth, which stipulated that the assurer "should give immediate notice of loss, within fourteen days, to the secretary or manager of the company, or to the agent, if there be any in the neighbourhood of the property insured, and as soon after as possible shall deliver in a particular account of such loss or damage, signed by him, and verified by his oath." which should contain a statement in regard to certain matters specified in this condition; and the assured was also to produce a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, stating that he had examined the circumstances attending the fire, &c., and was acquainted with the character and circumstances of the claimant, and verily believed that he had by misfortune, &c., without fraud or evil practice, sustained loss to the amount which the magistrate should certify: And until such proofs, declarations, and certificates, are produced, the loss shall not be payable."

⁽a) The Chief Justice was absent on the argument, and therefore gave no judgment. (b) See Wilkinson v. Kirby, 1 Jur. N. S. 164,

The fifteenth condition of the policy provided, that no action should be brought or sustained against the company for any claim under the policy, unless it be brought within twelve months next after the cause of action should accrue, and in case it should be brought afterwards, the lapse of time should be taken as conclusive evidence against the validity of the claim attempted to be enforced.

The declaration, in the first count, alleged that the plaintiff did forthwith after the loss, and within fourteen days, to wit, on the 26th of June, 1853, give notice of the loss, and deliver in a particular account, &c., and that he did also produce to the defendants, under the hand and seal of James J. Huntley, a notary public most contiguous to the place of the fire, and not concerned in the said loss, &c., a certificate (such as the policy requires), and did also then produce to the defendants, under the hand and seal of John Purney, Esquire, then being a magistrate most contiguous to the place of said fire, &c., a certificate, &c.

In the second count, the plaintiff, referring to the policy as stated in the first count, and the statements of loss, &c., contained in that count, averred that after the lapse of sixty days from the full completing of all things to bedone and performed by him, (before which time the sum insured is by one of the conditions of the policy not payable) to wit, on the 1st of January, 1854, and after the accruing of the causes of action against the defendants, and within twelve months from the time of such accruing, it was agreed between him and the defendants, that the defendants should waive the fifteenth condition of the policy as set forth, &c., requiring the action to be commenced within twelve months, and that any action (of the plaintiff's) might await the result of a certain action about to be brought by the plaintiff against the Ontario Assurance Company (being another company with which the plaintiff had effected an insurance upon the same goods, as set forth in the declaration), and that after the determination of such suit, he, the plaintiff, should be at liberty to proceed against the defendants on the policy, notwithstanding the lapse of twelve months in the fifteenth condition mentioned. He then averred that, confiding in this agreement, he allowed

the twelve months to lapse; that the other suit referred to was determined afterwards in the plaintiff's favour, and he thereupon commenced this action.

In a third count the plaintiff set forth a waiver of the fifteenth condition as in the second count, except that he alleged the agreement respecting such waiver of delay to have been made before he had furnished the requisite proofs, &c., and consequently before any breach of the covenant to pay.

The defendants, after pleading several pleas to the first count, traversing material averments in that count, pleaded, as their eighth plea to that count, that the plaintiff did not produce such certificate of the notary public as in that count

mentioned.

9th. That the notary named—viz., John James Huntley, was not the notary most contiguous to the place at which the fire occurred.

In the tenth and eleventh pleas, they made the same denials respecting the alleged certificate of the nearest magistrate.

And in other pleas the defendants traversed the agreement to waive the condition as to twelve months, which was stated in each of those counts:—and they gave no other answer to those counts.

The cause was tried at Toronto, before the learned Chief Justice of the Common Pleas. The evidence at the trial respecting the alleged certificates was only to the effect that on the 5th day of August, 1853, one Burney, a magistrate gave a certificate to the plaintiff, such in its terms as the ninth condition of the policy required; but that he was not the magistrate most contiguous to the place of the fire, but resided fourteen miles from it, there being two magistrates resident in the village of Dover, where the fire occurred, and seven or eight magistrates living nearer the village than Mr. Purney did.

There was no evidence given of any certificate of a notary public, nor was any necessary (except merely for sustaining the plaintiff's case against the eighth and ninth pleas), if that from Mr. Purney were properly admissible.

The plaintiff produced a letter of the secretary of the com-

pany, Mr. Stanton, written on the 9th of November, 1853, and addressed to and received by a person who had been urging the payment of the claim, as agent of the plaintiff, in which letter he wrote, "with reference to yours of the 5th inst, respecting Hiram Lampkin's fire, I am desired by the President and Board of Directors to acquaint you, that the party having failed in substantiating any claim for loss by accident or misfortune, as required by the conditions of the policy, the board is not disposed to admit the same."

The plaintiff's counsel relied upon this letter as a waiver of any objection for the want of a proper certificate, and further, he offered to prove by a witness called (the before-mentioned agent of the plaintiff), that about the 8th of March, 1854, being within twelve months after the fire, he called to speak to the secretary about this loss, having a power of attorney from the plaintiff, who was indebted to him, to receive part of the money; that the secretary not being present, he was referred by the book-keeper to the president of the insurance company, whom he saw; and it was stated by the plaintiff's counsel that his conversation with the president would be relied upon as shewing a waiver of all preliminary formalities of notice, certificate, &c., and also as a waiver of the condition that the assured must sue within twelve months.

The learned Chief Justice held that this would be no legal proof of waiver of the condition in the covenant under the seal of the company; and he told the jury that he considered the plaintiff entitled upon the evidence to succeed upon all the issues in fact raised upon the first count, except the eighth, ninth, tenth, and eleventh issues; and that upon these issues, and also upon the pleas to the second and third counts, he thought the defendants were entitled to a verdict. The jury found accordingly, assessing the plaintiff's damages under the first count at £272 10s.

Hagarty, Q. C., obtained a rule to shew cause why the verdict snould not be set aside without costs, as being contrary to law and evidence, for misdirection, and the rejection of evidence. He cited Wing v. Harvey, 27 Eng. Rep. 140: Acey v. Fernie, 7 M. & W. 151; Angell & Ames on Corporation, secs. 309 et seq.; Giles v. Taff Vale R. W. Co., 2

E. & B. 822; Walker v. York and North Midland R. W. Co., 2 E. & B. 750; Great Western R. W. Co. v. Goodman, 12 C. B. 313; Cort v. Ambergate, &c., R. W. Co., 17 Q. B. 127; Scotthorn v. South Staffordshire R. W. Co., 18 Eng. Rep. 555, and note at page 557.

Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this case was in all respects rightly disposed of upon the trial. The plaintiff undoubtedly shewed no title to a verdict upon the eighth and ninth issues, because he gave no evidence whatever of having at any time produced a certificate from the notary public named, or that there even was such a notary. His failing on these pleas would not have barred his action if he had succeeded on the ninth and tenth pleas, because the policy does not require a certificate from a notary as well as from a justice of the peace, but only a certificate from the one or the other. But the plaintiff failed upon the ninth and tenth pleas clearly, as we think, because he did not prove that the magistrate he went to was the nearest magistrate, but very much the contrary; for there were magistrates in the village, and yet the plaintiff went to one who lived fourteen miles distant, there being several also living between him and the village, or at least nearer to the village than he lived. And it appears also in the evidence that the magistrate he went to disclaimed at first to act, on the ground that he was not the nearest magistrate; so that the plaintiff persisted in taking his certificate, though his attention was called to the objection.

The plaintiff failing then upon all these pleas, and as we think inevitably, endeavours to rest his right to recover upon the second and third counts. These rest upon an alleged waiver by the company of the condition as to bringing the action within twelve months after the accruing of the cause of action; for in these counts the plaintiff himself admits that he did not sue within twelve months, and gives as his reason that the defendants—that is, the company—agreed to waive that stipulation in the policy. He shewed no agreement to

that effect under the seal of the company. If an agreement by the secretary in writing would be sufficient and binding on the company without any sealed release or waiver, still we think it clear that the secretary's letter did not amount to that. A waiver of a condition in a sealed instrument should at least be unequivocal; whereas this letter of the secretary, written after the time of paying had arrived, informs the plaintiff's agent that the company declines paying, because he had failed in substantiating any claim for loss by accident or misfortune, as required by the conditions of the policy. That can be no waiver of any condition, no dispensing with any certificate, or whatever the policy required; and it has no bearing upon the stipulation about suing within twelve months, which had not then nearly expired. To supply proof of waiver, it was desired that evidence might be received of an alleged conversation between the plaintiff's agent and the president of the company, not even at the place of business of the company, the purport of which was alleged to be that the condition for a certain reason would not be insisted upon.

The learned Chief Justice rejected that evidence, and we think properly. In some instances the president of a trading corporation, or the president and secretary, or the president with one or more directors, have power expressly given by the charter to do certain acts, and make certain agreements, which, though only by parol, shall bind the company-a provision which is often inserted for the convenience of the company: but there is no special provision that can be applied to this case; and whether such a conversation with the president alone would bind the company, and deprive them of the protection of the condition in the sealed instrument, depends on the general principles which govern corporate acts and liabilities; and we conceive the point admits of no doubt that the condition in this case could not be so got rid of, and therefore that it was proper to reject the only evidence that was offered to prove the waiver, which the defendants have traversed.

It cannot be contended that the president of such a corporation, on general principles, and without any special provision to that effect, represents, wherever he is, the whole corporation, not merely so far as to enable him to do such ordinary matters as somebody must be intrusted to do from necessity, without referring on every occasion to the board, but to that extent, that without any communication with the other directors, he can at his mere pleasure, and by verbal agreement, deprive the company of the benefit of any or all of the protections contained in the conditions of their policy. No case, we are confident, can be found to support such a position.

Rule discharged.

FOSTER ET AL. V. SMITH.

Fi. Fa.—What time may elapse between issuing and return of—Instructions to sheriff—Assignment—Evidence of continued change of possession.

A Fi. Fa. against goods may be made returnable with an interval of several terms. In this case it was issued on the 18th of July, 1854, returnable on

the 1st of Trinity Term, 1855.

The plaintiffs, claiming under an assignment in trust for creditors, not registered, proved clearly a delivery of the goods; but it was shewn that they had employed the assignor's clerk as their agent to keep and sell the goods in the shop, and that he had in some instances, without the plaintiff's knowledge, permitted the proceeds to be applied in payment of some small claims against the assignor, and on one occasion had paid money into the bank to his credit, that he might draw a check for it immediately, to pay a privileged claim which the plaintiffs had instructed their agent to pay; but the plaintiffs knew nothing of the deposit in the bank or of the drawing the check. It also appeared that their agent took no steps to give public intimation of the change of possession, either directly or by removing the assignor's name as the party carrying on the business, though he made weekly returns of sales to the assignees, -and this seemed to have been done at the solicitation of the assignor, who represented to him that he hoped to make arrangements again to resume the business. It appeared too that the fact of any change having being made was generally unknown in the neighbourhood.

Held, that upon this evidence it was properly left to the jury to say whether there was an actual and continued change of possession, and that they

were warranted in finding that there was.

A Fi. Fa. placed in the sheriff's hands with instructions not to sell until another writ comes in, is not in his hands to be executed, and will not bind the goods, either against a subsequent execution or a bona fide purchaser for value.

TRESPASS against the defendant, sheriff of the County of Brant, for seizing a quantity of goods contained in a shoe store at Paris, in the County of Brant.

Pleas—1st, Not Guilty. 2nd, Not possessed. 3rd. Justification under a Fi. Fa. in Capron v. Scott, issued on the 18th of July, 1854, returnable on the first day of Trinity Term, 1855 and received in the sheriff's office on the 18th of July, 1854,

alleging the goods seized to belong to Scott, and that the plaintiffs claimed title under a conveyance which was void as against Capron and other creditors of Scott. 4th, Justification, under an attachment issued from the County Court of Brant on the 20th of February, 1855, in a suit of McGuffin v. Scott.

Replication—Taking issue on the first and second pleas; to the third plea, admitting the writ, de injuriâ to the residue; and to the fourth plea the same.

At the trial, before Burns, J., at the last assizes at Hamilton, the facts of the case appeared to be these: - On the 18th of July, 1854, Scott, being indebted to Capron for money loaned to him, gave Capron a confession of judgment for £112, upon which Capron sued cut an execution against goods returnable on the first day of Trinity Term, 1855; and the writ was placed in the hands of the defendant as sheriff of Brant. The defendant, being examined as a witness, proved that the instructions he received on the 18th of July, 1854, with the writ were, that he was not to execute the writ, but to let the same lie dormant in his office until further instructions, or some other writs came into his office; and that it was understood the sheriff was not to enforce it unless other writs came into the office. The sheriff did not mention to Scott that he had the writ, or to do anything upon it till the 17th of February, 1855. Scott getting behind in his business, and owing the plaintiffs large sums, on the 25th of January, 1855, executed a bill of sale, with a schedule of the goods contained in his shop attached thereto, to the plaintiffs, as trustees for themselves and other creditors, to be paid in the order prescribed in the deed. The plaintiffs had no knowledge that an execution was then lying in the sheriff's office. plaintiffs appointed the person who had been Scott's foreman as their agent in respect of the goods. The plaintiffs lived in Hamilton; and on the 25th of January, 1855, one of them went up with the deed, which had been previously prepared, and arriving there in the evening, an account of the stock was taken. The amount oft he inventory was, for the stock \$1139 85c., and for the shop furniture £34 19s. 6d. person who had been Scott's foreman proved that the plaintiffs constituted him their agent to carry on the business of work-

ing up the materials on hand, and to sell off the goods as conveniently as possible. The plaintiff's removed Scott's books, and furnished their agent with others, and placed the cash box and keys of the establishment in the agent's hands. The agent made weekly reports of sales, &c., to the plaintiffs at Hamilton. The next morning after the delivery by Scott to the plaintiffs, and delivery by them to the agent, they left Paris for Hamilton. Scott then spoke to the agent, and requested him not to mention that an assignment had been made, but to keep it secret, for he thought he could manage to make some arrangement to get the business back again into his hands; but the plaintiffs knew nothing of this. Scott's name had never been upon the sign, and the sign above the door was not altered in any way. Scott's name was attached to printed placards, stating the selling off goods, for some time before the assignment was made, and these placards continued lying about the shop as they had been before. The men who worked up the materials (the work was done by the piece, and they were not employed by the month) continued to work after the assignment as before, nothing being said to them about the change. The agent stated that at the time of the assignment a sum of money stood in the bank to the credit of Scott; that the plaintiffs wrote to him to pay one of the creditors named in the assignment, who had a preference, the sum of £25; that he, not knowing anything about the proper way to transact such a matter, consulted Scott, who told him that the proper way would be to pay into the bank sufficient with what stood there in Scott's name, and then that he, Scott, should give the creditor a cheque for the amount. This was done. Scott attended about the shop, and at times the agent said he asked him to go behind the counter and sell for him. Scott was owing some small debts about the place, for which the parties had duebills, payable in shoes, &c. These the plaintiff's agent stated he paid at Scott's persuasion, who said that if he did not, it would be known that the business had passed out of his hands, and he could not get it back. On one occasion of renewing these due-bills for a smaller balance, the agent signed it with his name as agent for Scott. The plaintiffs knew nothing of

any of these matters. Scott absconded on the 13th of February. On the 16th of February a person who had endorsed a note for Scott, which was falling due, went to the shop to inquire for Scott. He was told by the person who acted for the plaintiffs that the business was no longer rightly Scott's; that he had said nothing about the matter, and had kept it secret, for that Scott had told him he thought he could get the business back into his hands. On the 17th of February the sheriff received instructions to enforce Capron's execution, and thereupon the defendant levied upon the goods, and took the same into his possession. On the 20th of February, 1855, an attachment was placed in the sheriff's hands, and other attachments followed. The sheriff sold the goods on the 13th of March, declining to cause the parties to. interplead, in consequence of being indemnified by the execution creditor. An estimate was proved of what materials were worked up between the 25th of January and the 17th of February, and what goods were sold, in order to shew what quantities remained when the sheriff took possession. The sheriff did not shew how much the goods sold for at the sale. Several witnesses living near Scott's establishment stated that they never heard of the assignment until Scott absconded, and considered the business going on as usual.

The learned judge told the jury, that in his opinion the execution lying in the sheriff's office under the instructions proved had no operation against the plaintiffs till the 17th of February, when the sheriff received instructions to proceed with it; and at that time Scott had made an assignment to the plaintiffs of the goods. If that assignment were a mere sham, and the goods were held for Scott's benefit, of course it could not operate; but assuming it to be for a bona fide consideration, which was not doubted or questioned, and that the deed was to be carried out, the deed not having been registered, the question for the jury was, whether there had been a change of possession on the 25th of January, and a continued change of possession from that time onward in the plaintiffs, until they were deprived of it by the sheriff. It was explained to the jury that the possession must be exclusively that of the plaintiffs, and that there must be no possession

jointly or otherwise in Scott: but if the plaintiffs had such exclusive possession, they would not be deprived of their property because people living near Scott did not know that a change had been made.

Connor, Q. C., objected to the charge, and contended that the execution bound the goods, and any sale Scott made of them must be subject to the execution attaching.

Also, that the effect of the Statutes respecting transfers of personal property to cast an obligation on transferees who do not register, that they should make known when a transfer is made; and that their not doing so affords evidence of fraud: that in this case it should not have been left to the jury upon the question of change of possession merely, but as an open question of fraud in these plaintiffs.

The jury found for the plaintiffs and £350 damages.

Connor, Q. C., obtained a rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, for misdirection, and for excessive damages.

Freeman shewed cause. Connor, Q. C., and Adam Crooks supported the rule.

The authorities cited are referred to in the judgments.

DRAPER, J.—The questions involved in this case are, first, whether under the circumstances, and considering our statutes the assignment to the plaintiffs from Scott was valid, so as to vest the property seized and sold by the defendant on the execution and attachment against Scott in the plaintiffs. Secondly, as bearing on and materially affecting the first question, whether Capron's Fi. Fa., tested on the 18th of July, 1854, and renewable on the first day of this present Trinity Term—that is, on the 27th of August 1855—is a valid writ; and if valid, whether it could defeat the assignment made by Scott to the plaintiffs, on account of the instructions accompanying the delivery of that writ to the sheriff, the defendant. If both these questions are decided in the plaintiffs' favour, the only one that remains is, whether the damages are excessive.

As the first question: our statute 12 Vic. ch. 74, enacts that every mortgage or conveyance intended to operate as a

mortgage of goods and chattels, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed as directed. And by the 13th & 14th Vic. ch 62, this first section is amended, by adding that every sale of goods and chattels which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of the former act, and all such conveyances shall be accompanied with an affidavit containing certain particulars; otherwise such mortgage or sale shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. There was no such affidavit made in the present case, nor was there any filing of the conveyance; unless therefore there was an immediate delivery, followed by an actual and continued change of possession, the sale would be void. There certainly was abundant evidence of delivery; evidence which remained unimpeached throughout. The evidence of continued change of possession was equally ample, and, so far as regarded the credibility of the witness, equally unimpeached. The doubts thrown upon it arose from the conduct of this witness, who was the plaintiffs' agent in receiving, keeping and selling the goods, and who in some instances permitted the proceeds of goods sold to be applied for the satisfaction of some small claims against Scott, the original owner; and on one occasion paid money into the bank to Scott's credit, that Scott might draw a check for it immediately to satisfy a privileged claim. As to the former of these transactions, they were small in amount, and were done by the agent on Scott's solicitations, and were wholly unknown to the plaintiffs: as to the latter, they were assenting parties to the payment to Scott's creditors, but knew nothing of the deposits in the bank, or of Scott's drawing the check. They had a right to suppose this matter was transacted by their own agent. This agent also took no steps to give

public intimation of the change of possession, either directly or by removing Scott's name as the party carrying on the business. His conduct in all this seems to have proceeded from an expectation held out by Scott that he should be able to make arrangements and re-assume his business; while in the meantime the agent made weekly returns of his transactions to the plaintiffs for their information and benefit. This evidence was, I think, properly left to the jury, with a charge quite as favourable to the defendant as was right. It was certainly a question for them, and I do not feel warranted in saying they have not properly decided it.

Then the defence is reduced to the question, whether the sale to the plaintiffs was nugatory as against the Fi. Fa. pleaded, which was tested and put into the sheriff's hands on the 18th of July, 1854, but coupled with instructions not to act upon it by a seizure until some other writ was delivered to the defendant, and which writ is not returnable until the 1st of Trinity Term-i. e., the 27th of August, 1855,—thus making an interval exceeding thirteen months between the receipt of the writ by the sheriff and its return day. According to the judgment of Parke, B., in Simpson v. Heath (5 M. & W. 637)—(See also Pringle v. Isaac, 11 Price 445)— "Under the old practice, and indeed still, a writ of execution might be made returnable with an interval of several terms; and consequently, if such a writ (a Ca. Sa.) was sued out within the year, a defendant might be taken upon it long after the year, but before the return of the writ." Then, as the goods are bound from the time of the delivery of the writ to the sheriff, so that they may be taken in execution notwithstanding an assignment (excepting by sale in market overt) made by the execution debtor, the question really is whether this execution can, under the circumstances, be treated as fraudulent against the plaintiffs. The instructions given to the sheriff bring this case within the principle of Kempland v. Macaulay (Peake, N. P. C. 66), and the rather when so extraordinary an interval is left between the teste and the return day of the writ; and if the present plaintiffs were judgment creditors, having placed their execution in the sheriff's hands on the day on which they obtained possession

² i-vol. XIII. Q. B.

under the assignment to them, the cases shew clearly that the first execution would be postponed to theirs. But these cases fall short of what the plaintiffs in the present case seek to Their position is, not simply that the first Fi. Fa. delivered to the sheriff shall, when accompanied with instructions to the sheriff not to act upon it until another writ is delivered to him, be postponed to such other subsequent writ. but that such instructions accompanying a writ prevent the operation of the writ in binding the debtor's goods from the time of the delivery of the writ and while it is still current. Upon this question the case of Samuel v. Duke (3 M. & W. 622) appears to me to have a very important bearing. case shews that the execution debtor is not prevented by a delivery of a Fi. Fa. to the sheriff from assigning or selling his goods, and that such assignment and sale will pass the property; but that the goods will still remain subject to the rights of the execution creditor, though in the hands of the purchaser from the debtor, unless the sale were in market overt. And that case, as I understand it, appears to me to have a strong bearing in the defendant's favor, unless it were shewn that the judgment and execution were fraudulent and void. For if the goods were bound, then the sheriff seizing them while the Fi. Fa. was current was justified. But the case of Hunt v. Hooper (12 M. &W. 664)-citing Barker v. St. Quintin, Ib. 441—certainly serves to establish that, though a writ be put into the sheriff's hands, yet if it be accompanied with directions not to sell; or, though no such directions were given on the delivery of it to the sheriff, if the execution be stayed or countermanded in such a manner as to amount in law to a withdrawal of it: it cannot be considered as in the hands of the sheriff to be executed, and therefore will not bind the goods under the Statute of Frauds. I was at first disposed to think this applied only to questions arising between execution creditors; but on further reflection, I concur with my learned brother in thinking that it must apply to all cases in which the question whether the goods were bound by the delivery of any particular writ to the sheriff arises; and that there is no better reason for holding the goods to be bound by a Fi. Fa. which the sheriff is told not to execute until some future event

takes place, or against a bona fide purchaser for value, than there is as against a creditor who puts a Fi. Fa. subsequently into the sheriff's hands. As to the question of damages, my learned brother does not think that ground sustained by what appeared at the trial, and I am not inclined to differ from him on that point. The rule therefore should be discharged.

Burns, J.—It appears from Simpson v. Heath (5 M. & W. 637) that the Fi. Fa. produced in this case at the trial was not void by reason of having an interval of several terms between the issuing of it and the return. The case of Shirley v. Wright (2 Salk. 700, and 2 Lord Raym. 775) is an authority to the same effect. I thought at the trial, that although the Fi. Fa. was received in the sheriff's office on the 18th of July, 1854, yet that, being received with instructions that he was to do nothing upon it, but to keep it dormant in his office till further instructions, and those further instructions to act upon the writ never having been given until the 17th of February, 1855, it was just as if the attorney had kept the writ in his own office until that time, and then had for the first time placed the writ in the sheriff's hands to be executed. question is, whether that view be correct, or whether, notwithstanding the instructions, the goods of the execution debtor were bound all the time from the delivery of the writ into the sheriff's office. Samuel v. Duke (3 M. & W. 622) decided that the plaintiff, having once abandoned his writ, his right upon it could not revive to exclude another bond fide claim. Baron Parke said, that in the case of a transfer of property after delivery of the writ to the sheriff, though the title still was legally in the execution debtor, and he could give title to his transferee, yet that the transfer was subject to the claim of the sheriff under the writ, unless it was in market overt, in which case the sheriff would have no claim. Ranken v. Harwood (10 Jur. 794), before V. C. Wigram, is another decision to the same effect. The question now presented is, at what time was the writ of Fi. Fa. in the sheriff's hands to be exccuted. The Statute of Frauds (29 Car. II. ch. 3, sec. 16) enacts "that no writ of execution shall bind the property of the goods, but from the time such writ shall be delivered

to the sheriff to be executed. It does not appear to me that this is confined to any inquiry between different execution creditors, but I think it applies to all cases; and the true question is, at what time the writ of Fi. Fa. is to be considered as in the sheriff's hands to be executed. Barker v. St. Quintin (12 M. & W. 441) shews that if the sheriff had levied on the debtor's goods before he received the instructions to proceed upon the writ, he might have been treated as a trespasser. In that case Lord Abinger said: "It is true that the sheriff is an officer of the court, but the court appoints him to do the plaintiff a service, and will not put him in motion unless at the instance of the plaintiff. It is the plaintiff who is the party to give the sheriff notice to do or not to do anything." In Hunt v. Hooper (12 M. & W. 664) Baron Parke, in delivering the judgment of the court, affirms the principle that if the sheriff should proceed to levy upon an execution not in his hands to be executed he would be a trespasser. In this last case the court decided that a countermand of the execution, though leaving it in the sheriff's hands, was equivalent to a withdrawal of it for the time, and that it could not be considered as having been delivered to be executed until the order to proceed was given. I see no distinction between that case and the present, where the writ was placed in the sheriff's hands with instructions not to proceed until further directions. From the time the directions are given to proceed upon the writ, whether that be with the delivery of it to the sheriff or at a subsequent time, it is an execution in his hands to be executed. The delivery for that purpose is to be considered when it is to be acted upon. That principle seems to be enunciated in Hunt v. Hooper as the proper construction of the Statute of Frauds; and if correct, then I do not see how the writ in this case is to be considered to be in the sheriff's hands to be executed before the 17th of February, 1855. After that time the execution debtor could have made no sale or transfer, except in market overt, which would defeat the execution (a).

Rule discharged.

⁽a) This case was argued last term, in the absence of the Chief Justice, and no judgment was therefore given by him.

MAXWELL V. CRANN.

Trespass for taking goods-Measure of damages.

In an ordinary action of trespass for taking goods, the measure of damages is the value of the goods when taken (which the jury-may estimate liberally), and interest. It is only in a very peculiar case that such value can be exceeded, and the excess claimed must be stated as special damage.

TRESPASS, for seizing and taking a spinning frame of the plaintiff's.

Pleas-1. Not guilty. 2. Not possessed.

At the trial, before Burns, J., at the last assizes at Hamilton, the facts appeared as follow: - The plaintiff lived at Collins's Falls in the State of New York, and was possessed of some knitting frames, which he had brought from Scotland with him a few years ago. His son desired to come to this country, and carry on the same work at Ancaster, but not having a frame of his own, the plaintiff let him have the one in question at 2s. 6d. per week by way of rent, which the son was to pay for the use of it. A brother of the plaintiff came to this country with his nephew, and they set to work at Ancaster, but the frame in question had never been used up to the time it was seized on behalf of the defendant, The plaintiff's son became indebted to the defendant in some £5, for which the defendant sued in the Division Court, and obtained judgment; upon the judgment an execution was issued, and the frame seized. At the sale in March last the defendant attended, and he was informed that the frame belonged to the plaintiff, and not to his son, against whom he had the judgment, and was requested not to sell it. He replied that it had been seized and the sale must go on, and refused to withdraw his claim. The plaintiff's brother then furnished a person attending with money to bid up to the amount of the debt, to prevent, as he stated, the frame from being sacrificed. The plaintiff's brother became the purchaser at £7 5s. He stated he did so thinking his brother might repay him, though he was not bound to do so; and he stated that since that time he had refused to pay him, and he considered the frame was now his. Other members of the family seemed to think that the frame had been bought in for the plaintiff, to prevent it being sacrificed. It was

proved to have cost in Scotland £150, and had not been much used. On the part of the defence it was proved that frames as good as that one, made in Philadelphia, cost about \$70.

The learned Judge told the jury they must decide whether it was true that the frame was the plaintiff's property, and if so, then it only remained to consider the amount of damages. On this point he remarked, that in an action of this description, where the plaintiff had been deprived of his property, the proprietor was prima facie entitled to recover the value as against a wrong-doer, and was not obliged to follow a remedy against the person into whose hands it had come. In this case, however, it rather appeared that the plaintiff's brother was acting a friendly part towards the plaintiff, and probably had purchased for him, and the jury should rather be induced to think so, in which case the proper measure of damages would be the sum paid, together with any reasonable amount to compensate the plaintiff for the trouble and expense he would be at in asserting his right; and the reason for so telling the jury was because the defendant had been warned against persisting in selling the frame.

Freeman objected to the charge, contending that in no case of tort to personal chattles should the jury be told to do more than give interest upon the value of the article, or interest on the money paid.

The jury found for the plaintiff, and damages £37 10s.

Freeman obtained a rule to shew cause why the verdict should not be set aside, being contrary to evidence and the Judge's charge, and for misdirection respecting the measure of damages. He cited Creed v. Fisher, 9 Ex. 472; Holloway v. Turner, 14 L. J. (Q.B). 143; Hadley v. Baxendale, 9 Ex. 341; S. C. 18 Jur. 378; S. C. 23 L. J. (Ex.) 179.

Adam Crooks shewed cause, and cited Chapman v. Speller, 14 Q. B. 621; Buckland v. Johnson, 26 Eng. Rep. 328.

DRAPER, J., delivered the judgment of the court.

If the sole question presented was the amount of damages, we do not think we should be inclined to interfere; but the question is, whether the jury were properly directed when they

were told that the measure of damages was the sum paid to get back the property, together with any reasonable amount to compensate the plaintiff for the trouble and expense he would be at in asserting his rights, the defendant having been expressly warned not to persist in selling the frame. The jury certainly are not confined to the value of the goods at the time of the seizure by the wrong-doer; for by statute 7 W. IV. ch. 3, sec. 21, they may give interest in the nature of damages, over and above the value of the goods. But so far as this affords any indication, it tends to shew that the measure of damages was treated as the value of the goods at the time of the wrongful act, and the conclusion would be adverse to allowing other considerations to enhance the amount of damages in actions of this description. The court do not, we apprehend, set themselves to work to ascertain whether in estimating the value of the goods the jury may have put a high price on them--may not perhaps have looked rather to what they may be considered to have been worth to the plaintiff than their market value: and in directing a jury, I have not thought myself overstepping the proper line in saying that they are not bound down to a rigid estimate of the saleable value of articles taken wrongfully from a plaintiff, whether the action be trespass or trover. But that, if correct, does not introduce any other element than a valuation of the goods themselves, as forming the true measure of damages. Of course, where special damage is stated and claimed, that must be disposed of on its own merits: no such question arises here. In submitting to the jury, however, as legal ground on which they may allow damages to a plaintiff in an action de bonis asportatis, the trouble and expense he may have beeen put to in getting back his property, a different aspect presents itself. The plaintiff has, it would seem recovered back his goods, or was in a position to do so, by some arrangements made between him and the purchaser at sheriff's sale, at a price less than the actual value of the goods. In making such arrangements, if the plaintiff shewed trouble and expense incurred by him, we do not see that they might not be included in the verdict together with the price the plaintiff had to pay, always assuming that any allowance to be so made, and the price so paid, will not together exceed, if they in fact amount to, the value of the goods taken at the time of the wrongful act committed. Taking this value as the basis of any verdict, and limiting the verdict by it, we are not prepared to say, that when the plaintiff has got back his goods the damages may not wholly consist of what he has necessarily expended in money and in time so to recover them, and if wholly, then in part also; always restricting the verdict within the amount of the fair value of the goods themselves. If a plaintiff claims not only the full value of the goods taken, but damages ultra, such damages must, in my opinion, be stated in the declaration as special damage, and will be recoverable or not, according to the special circumstances. While, however, we are not called upon to say that under no possible circumstances can the verdict exceed the fair value of the goods taken, we may observe that we think it can only be in a very peculiar case that such value can be exceeded, or other elements be admitted to compose the verdict. The language of Erle, J., in Beckham v. Drake, (2 H. L. Cas. 607-8,) is in favour of going to the full extent of admitting such other elements. He says: "If goods are not delivered or accepted according to contract, time and trouble, as well as expense, may be required either in getting other similar goods or finding another purchaser, and the damages ought to indemnify both for such time, trouble and expense, and for the difference between the market price and the price contracted for."

Considering the damages as being within the value of the goods, we think the rule should be discharged.

Burns, J., concurred (a).

Rule discharged (b).

(b) See Flint v. Bird et al., 11 U. C. R. 414; Williams v. Currie, 1 C. B. 841; Keene v. Dilke, 4 Ex. 388.

⁽a) The Chief Justice having been absent during the argument, gave no judgment.

WARNOCK V. COWAN.

Survey—11th Con. of Trafalgar—Mode of ascertaining side lines—What is a "double front concession"—59 Geo. III. ch. 14, secs. 2, 3, 9, 10—10 & 11 Vic. ch. 54—12 Vic. ch. 35, secs. 35, 37—18 Vic. ch. 83, sec. 9.

The Eleventh Concession of Trafalgar, the last to the east, and adjoining the road allowance between Trafalgar and Toronto, is only thirty chains deep, less half than the depth of the other concessions in the same township, which are sixty-six chains sixty-seven links. In the original survey posts were planted on the front or west side of this concession to mark the lots, and also at the rear or east side, on the road between the two townships; but the lots in it were granted as broken lots, containing 90 acres, not as half lots, except lot eleven, in question, which was erroneously described as containing 100 acres.

Held, not a double front concession, within the meaning of the statutes; and that the side lines in it should be ascertained by running from the posts in front, parallel to the base line of the township, through to the road between the two townships, and without reference to the posts or tha troad.

EJECTMENT for lot No. 11, 11th concession of Trafalgar, Writ issued 15th March, 1854. Defence limited to the land north of the fence now dividing the premises respectively occupied by the plaintiff and defendant, which defendant claims as part of No. 12, in the 11th concession of Trafalgar.

The case was tried in May, 1854, at Toronto, before Macaulay, C. J.

The 11th is the easternmost concession of the township of Trafalgar, and adjoins the road allowance between the townships of Toronto and Trafalgar. According to the government plan, the course of the concession lines is N. 45° W., and the course of the side lines is N.38° E. The plaintiff and defendant both agreed to the place of beginning at the north-west angle of lot No. 11, being also the south-west angle of lot No. 12. The government description of lot No. 12 (issued apparently on the 27th of April, 1832, though the location ticket was issued 27th December, 1819) begins "where a post has been planted at the southerly angle of the said lot; then N. 45° 10' W. 30 chains, more or less, to where a post has been planted at the westerly angle of the said lot; then N. 38° 17' E. 30 chains, more or less, to the allowance for road between the townships of Toronto and Trafalgar; then S. 45° 10' E. 30 chains, more or less, to the southern limit of the said lot; then S. 38° 17' W. 30 chains, more or less, to the place of beginning, containing 90 acres, more or less. The description calls it the broken lot No. 12. The description of

No. 11, issued apparently on the 10th of November 1830, calling it the broken lot No. 11, beginning where a post has been placed at the southerly angle of the said lot; then N. 45° W. 30 chains, more or less to where a post has been planted at the westerly angle of the said lot; then N. 38° E. 33 chains 33½ links, more or less, to the allowance for road between the townships of Toronto and Trafalgar; then S. 45° E. 30 chains more or less, to the southern limit of the said lot; then S. 38° W. 33 chains 33½ links, more or less, to the place of beginning, containing 100 acres, more or less." All the concessions in Trafalgar except this (the 11th) are laid out with double fronts, the full depth from front to rear being 66 chains 67 links. The lots are described in halves, running from front to rear to the centre of the concessions, monuments or posts being planted in front and rear. The 11th concession was, according to the evidence of some of the witnesses, only 30 chains, though No. 11 was described as having a depth of 33 chains 33½ links, more or less.

The concessions number from W. to E.; the lots from S. to N. The south-west angle would be therefore the front angle of each lot, if they had been laid out as whole lots. The plaintiff claimed that, as the 11th concession was only in fact 30 chains deep, less than the half of the full concessions, which were 66 chains 67 links, he should run from the front of the 11th concession, commencing at the boundary there, which was equally adopted by himself and the defendant as the point of starting, though, on the given course, to the road between Trafalgar and Toronto; and that wherever the line so produced from this boundary intersected that road would form the south-east angle of No. 11, the north-east angle of No. 12; and upon this ground, and the evidence of a surveyor establishing that the line so run cut off the portion of land defended for, he claimed to recover.

The defence was founded on the statute 12 Vic. ch. 35 sec. 37. Evidence was given that the same surveyor was employed to survey this part of the township of Trafalgar, and also of the adjoining township of Toronto; that he run a line as the centre of the road which divides these townships, and planted stakes on each side of this road to mark the corner of lots. He then

surveyed Toronto; which being done, he began the survey of Trafalgar, and commenced at the west side—i.e., at the opposite extremity from this road-laying off the concessions on the base line from west to east. He laid off ten full concessions with double fronts, posts being planted at the front and rear angle of every lot. In running the concession road in front-i.e., on the west side of the 11th concession-he planted stakes on each side; one set of stakes-i.e., those on the west side of the road-marking rear angles of lots in the 10th concession; the other, on the east side, marking the front angles of lots in the 11th concession. But the 11th concession, as already observed, fell short of half the depth of a full concession, being only 30 chains from its front until it reached the road dividing the townships, and where stakes had been planted when this road was first run out; and the defendant contended that these stakes on this road governed the rear or eastern limit of the lots on the 11th concession, as the other stakes governed the front or western limit.

It was argued that the line should be run—without reference to its being parallel to the base line, or corresponding with the course in the government description—from the post in front to the post in the rear; or that (and that was the defence insisted on) the direction of the statute already quoted should be followed, and that each post should be made a point of commencement, and that a line should be run from thence parallel to the base line as far as the centre of the concession, though the result was that the lines would not meet, and the two halves of the lots would not correspond with each other.

Copies of the government plan, instructions to the surveyor, field notes and descriptions, were all put in.

The learned Chief Justice directed, that if the jury found that posts were planted at the original survey, both in front and rear of the 11th concession, the proper plan to take was to run the lines from the post in front to that in the rear, regardless of the course of the base line, or that given in the description.

The plaintiff's counsel objected to this direction, and contended that the course of the base line should govern, and that no attention should be paid to the posts in the rear, which were not referred to in the description.

The jury found for the defendant.

In Easter term, Wilson, Q. C., moved for a new trial on the law and evidence, and on the ground that the jury were misdirected.

Hagarty, Q. C., shewed cause.

The statutes bearing upon the question are referred to in the judgments.

DRAPER, J.—The 59 Geo. III. ch. 14, was passed on the 27th of November, 1818. Section 2 enacts, that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts or monuments, which have been placed or planted at the front angles of any lots or parcels of land in the first survey, intended to determine the width of such lots or parcels of land-provided such survey has been performed under the authority of the executive government -shall be the true and unalterable boundaries of all and every of such township, &c., without regard to what may be expressed in any letters patent, &c. Section 3 made the boundary line of each township on that side from which the lots are numbered the course of the division or side lines. By sec. 9, that end or boundary of each concession or lot which is nearest to that boundary of the township from which the concessions are numbered is the front of such concession or lot. Section 10 in effect provided that the side lines in each concession shall be run from the front angle of each lot, without any regard to such angle, or the line run therefrom, corresponding with the front angle of lots in the adjoining concession in the rear.

The instructions to survey this township were given in February, 1819, not quite three months after this act was passed. The surveyor is thereby, among other things, directed "to determine the true course of the allowance for road between Toronto and Trafalgar," and from the "centre of that allowance produce the same on the given course N. 45° W." 454 chains, which will be the north-west angle of Toronto and north-east angle of Trafalgar respectively.

"As you proceed with that aforesaid line, and at the distance of 50 links therefrom, you will lay out fifteen lots, each 30 chains wide, parallel to the base, posting and numbering each angle of the same." In another part, in reference to the township of Toronto, the surveyor is directed to produce from the centre of the allowance for road between lots Nos. 15 and 16, 2nd concession north of Dundas street, the same line on a course N. 45° W. 454 chains, making and laying out at the distance of 50 links from the centre of this line, on each side thereof, and parallel to the line, fifteen lots of 30 chains width each, posting and numbering each angle of the same. "From this line, which is intended for a street or road of communication, the concessions are to be surveyed on each side, giving to each concession the depth of 66 chains 67 links, upon which the lots are to be laid out, posted, and numbered, giving them a double front as upon the street communication." Then as to Trafalgar, the instructions add "that it is to be surveyed and numbered from a street communication as in Toronto-they" (meaning, I suppose, the concessions) "will be surveyed and numbered from west to east throughout."

The probable effect of the statute passed only in the November previous, seems not to have been apprehended when these instructions were framed. The west side of the township, being the boundary from which the concession numbered, was the front thereof, and consequently the west side of every concession was its front, and the line of posts directed to be planted on the Trafalgar side of the road dividing Toronto and Trafalgar would be, and were planted in the rear of the latter township, and consequently, under that act, could not govern the side or division lines between lots.

Still, however, in the statute 10 & 11 Vic. ch. 54, in regulating the mode in which side lines should be run in the township of Osgoode, it seems to have been assumed that the proper and legal manner of running the side lines in townships which had been surveyed with double fronts, and granted in half lots, was to commence at the post in front and run to the centre of the concession for the front half lots, and to

commence at the post in the rear and run to the centre of the concession for the rear half lots, always running parallel to the governing side line of the township; though this effect was that the lines did not meet, and where there were roads between lots they could not continue straight through from one concession to the other. To remedy this inconvenience in the township of Osgoode, (except as to concessions 1, 2, 3-see 13 & 14 Vic. ch. 86), it was enacted, that the side lines should be run from the post in front to the post in rear. without regard to the course of the governing side lines of the township. So far, therefore, we have a quasi interpretation of the application of the statute 59 Geo. III. to concessions surveyed with double fronts; and it may be taken perhaps as going to this extent-first, as clearly recognizing that the course of the different lines between lots is to be governed by the course of the township line on that side from which the lots number; and, secondly, that in townships surveyed with double fronts, and granted in half lots, and posts planted in the rear of the concession are to be treated as the governing points or starting places for the survey of the rear half lots.

The statute of 12 Vic. ch. 35, which repealed the act of 59 Geo. III., however, must be construed on its own language without the aid of this interpretation,-First, because it is the latter act; secondly, because it makes for the first time express provision for the case of townships the concessions of which are surveyed with double fronts. By the 35th section of this statute it is enacted that the course of the boundary line of each and every concession, on that side from which the lots are numbered, shall be the course of the side lines in every township or concession of Upper Canada, provided, first, that such side lines were intended in the original survey to run parallel to the said boundary. There are several other provisoes, but not bearing materially on the question at issue. And the 37th section enacts, that in those townships in Upper Canada in which the concessions have been surveyed with double fronts-that is, with posts or monuments planted on both sides of the allowances for roads between the concessions-and the lands shall have been described in half lots, the

division or side lines shall be drawn from the posts at both ends to the centre of the concession, and each end of such concession shall be the front of its respective half of such concession; and that a straight line joining the extremities of the side lines of any half lot in such concession, drawn as aforesaid, shall be the true boundary of that end of the half lot not bounded in the original survey. If, therefore, this lot of land falls within the terms of this section, we have a positive rule given us to work by—one by which the defendant insists he is protected.

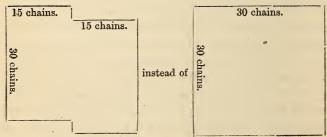
The evidence shews that Trafalgar was in fact, and according to the instructions, surveyed with double fronts—that is, with posts or monuments planted on both sides of the allowance for roads between the concessions. It appears also, by the descriptions of the east half of lot No. 12, of the westerly quarter of No. 12, of the west half of No. 11, and of the east half of No. 11, all in the 10th concession, that Trafalgar so far "has been described in half lots." The application of the rule to ten of the concessions of Trafalgar seems indisputable. Does it apply to the 11th concession?

There is a curious discrepancy between the descriptions of these two adjoining lots, Nos. 11 and 12 in the 11th concession. The courses of No. 11 are-first, N. 45° W., and its reverse for returning; and, secondly, N. 38° E., and its reverse for returning. The first line and its parallel are described as 30 chains long, and the first line commences at a post planted at the southerly angle of the lot, and runs to a post planted at the westerly angle, both posts being on the concession line between the 10th and 11th concessions. The second line and its parallel are described as being 33 chains 331 links long, but are not described as terminating at any post. courses of No.12 are-first, N. 45° 10' W. and its reverse for returning; and, second, N. 38° 17' E. and its reverse for returning. And all the four lines are described as 30 chains long. The first line also begins at the southerly angle, where a post has been planted, runs to a post planted at the westerly angle, and the description refers to no other post. The northern boundary of 11 and the southern boundary of 12 were certainly meant to unite, to form one line, and yet the courses given are not identical.

The description of broken lots 6,7,9,10, and 13, in the 11th concession, also in evidence, corresponding with the description of number 11 as to the courses, and with number 12 as to the distances, while the descriptions of all the lots in the 10th concession correspond with that of number 12 as to the courses, and of number 11 as to distances—the latter being right, as these lots are described as containing 100 acres—while numbers 6, 7, 9, 10, 12, and 13, are described as containing only 90 acres each, and number 11 as containing 100.

As to the course of the side line, it is plain that the 37th section of 12 Vic. ch. 35 prescribes no rule. It leaves the rule established by the 35th section untouched. They must be parallel to the boundary line of the 11th concession on that side from which the lots are numbered—i. e., from the south side.

The only question therefore is, whether the line is to be run from the front of the 11th concession, where the posts referred to in the description are planted, directly through, as the description says, to the allowance for a road between the townships of Toronto and Trafalgar, or only through to the centre of the concession, for the west half of the lot; and for the east half to begin at the posts planted along that road, and run westerly to the centre of the concession, the result of which, according to the evidence, is, that the lots will be of the shape of the following, viz:



During the last session, however, the legislature passed another Act (18 Vic. ch, 83), entitled "An Act to amend the Act relating to land surveyors;" the 9th section of which is in these words:—

"And whereas some of the double front concessions in the townships in Upper Canada are not of the full depth, and

doubts have arisen as to the manner in which the division or side lines in such concessions should be established; be it therefore enacted, that in such concessions the division or side lines shall be drawn from the post at both ends thereof to the centre of the concession, as provided in the 37th section of the act first cited in the preamble to this act (12 Vic. ch. 35), without reference to the manner in which the lots or parts of lots in such concession shall have been described for patent."

Even this enactment does not make the question in the present case perfectly clear. The 11th concession is only 30 chains deep, which is 3 chains 331 links less than half the depth of the full concessions in this townships, so that there could be no half lots, i.e., no lot containing 100 acres, described in this concession, although this description of number 11 does profess, though clearly erroneously, to give a half lot. All the lots in this concession respecting which we have any evidence are granted as broken lots, and are granted as an entirety of 90 acres, with the exception above noted; and therefore the definition of "double-fronted concessions"—that is, a concession with posts or monuments planted on both sides of the allowance for roads between the concessions, and in which the land shall have been described in half lots-does not strictly apply to this concession, for no half lots have been described; and the eastern end, or rear of this 11th concession, is bounded by a road between it and another township, which is not in the literal sense of the words, an allowance for road between the concessions.

Without any great violence to the letter of even the latter act, it may be contended that it does not apply to the case of a broken lot, not amounting to so much as the half lot would contain in depth if the concession were of the full depth of 66 chains 67 links, and that this section was intended only to apply to cases in which the concession though not of the full depth, is nevertheless of greater depth than 33 chains, $33\frac{1}{2}$ links, so as to have posts planted in front and in rear, for the only object which that plan of survey contemplated was, to establish the starting points for grants of parts of lots abutting on each other within the concession.

I think this is what the legislature would have said if this precise case had been submitted to them, and it is, in my humble opinion, the result of the whole of the enactments, that this 11th concession is not a double-fronted concession

² l-vol. XIII. Q. B.

within the terms of the definition given by the legislature, and that the side lines should be run from the posts in front of the concession line, parallel to that line of the township from which the lots are numbered, through to the land dividing the two townships, and without regard to the range of posts planted on that road. There should therefore be a new trial.

Burns, J.—The first question to determine is, whether the 11th concession of this township is to be treated as a concession with double fronts. The other ten concessions undoubtedly are so. The 37th section of 12 Vic. ch. 35 says, that in those townships in which the concessions have been surveyed with double fronts and the lands have been described in half lots, the rule enacted therein shall govern in surveying the side lines. It is the combination of the survey in the township with the descriptions issued for half lots, which renders the rule stated in that section applicable. If some of the lots in a concession so surveyed were granted by the whole lots, and others were granted by half lots, still I apprehend the rule so contained in the 37th section would prevail; but the question here is, whether the same rule shall govern a concession which contains less than half the depth of a concession, and in which the descriptions are not by half lots. In other words, must the eleventh concession be treated in the same manner as the other ten concessions? If the descriptions had been issued on the eleventh concession in half lots as in the others, then, no matter what the depth of it might have been as compared with the others, the same rule must prevail. One way of a solution of the difficulty, as it appears to me, is to consider, whether there may exist one rule with regard to one concession of the township, and yet a different rule prevail with respect to the others. I see nothing incompatible in holding that it may be so. In the survey originally the government need not have made the concessions all of the same depth, nor need the descriptions of every concession have been issued by half lots. I understand the legislature, in the 37th section, of the act mentioned, to provide for the cases where the survey has been upon the principle of double fronts to the lots, and that the lots have been described as half lots. Now, suppose one half of a township governed by that rule, but that the other

half should be surveyed without double fronts to the lots, or being so described-what rule, it may be asked, would govern the latter? I apprehend it could not be the former; and if a different rule must govern the one half of a township from the other half, I do not see why the same may not apply also to a single concession. As the Legislature have combined the survey with the manner of describing the lands granted, in providing a rule, I see no incongruity in applying that rule to a portion of the township, leaving other portions of the township to be governed by other rules. The lots in the eleventh concession are not described in half lots, but are described as broken lots; therefore I am of opinion this is not a concession with double fronts. The recent act, 18 Vic. ch. 83, sec. 9, does not, I think, affect the question. That act provides for double-front concessions not of the full depth in the same manner as the 37th section of the former act has provided; but before this last act can be applied, it must appear that the concession was a double-fronted concession. Whether the concession contained less than half the quantity of land in a full concession, or contained more than the half but less than the whole quantity, I do not think makes any difference. The question under this last act, in my opinion, would always be, whether the concession was or not a double-fronted concession. I have expressed my opinion to be that the eleventh concession cannot be considered as a double-fronted concession, and consequently this last act does not apply to it.

The second question is, then, upon what principle this concession is to be surveyed in regard to the side lines of the lots. The 35th section of the act 12 Vic. ch. 35, gives the rule. The survey should have been a line drawn from the posts at the angle, which would be on the west end of the lot, parallel to the township line, through to meet the road between the townships of Trafalgar and Toronto. The jury should have been so instructed; and, as it appears that by such mode of survey the defendant has some land in his possession which would belong to the plaintiff, there should be a new trial without costs.

Rule absolute (a).

⁽a) The Chief Justice having been absent during the argument, gave no judgment.

Hodgson v. The Municipal Council of York and Peel, and The Municipal Council of Ontario.

By-law establishing a road—Insufficient description—Discretion in quashing by-laws.

The statute does not make it strictly imperative upon the court to quash defective by-laws; and in this case—where the road established by the by-law was not sufficiently described, but it appeared that it was clearly defined and marked by fences on each side, and had been travelled for eight years—they refused to interfere.

Wilson, Q. C., obtained, last term, a rule nisi to shew cause why a by-law (No. 83) for opening a road across lots 15, 16, 17, 18, 19, & 20, in the 8th concession of Whitby, should not be quashed, on the ground that it does not sufficiently describe the line of road.

The by-law was passed on the 14th of August, 1845, by the District Council of the Home District, and it enacted "that a new line of road, surveyed, laid out, and reported by John Farquharson, Esquire, a road surveyor, across lots 15, 16, 17, 18, 19, & 20, in the 8th concession of the township of Whitby, by his report bearing date the 1st day of August, 1845. be established and confirmed as a public road or highway."

The by-law did not refer to the surveyor's report as being annexed to it, and it was not shewn that there was or had been a report on the same sheet of paper with the by-law, or in any manner annexed to it; but on the same sheet of paper which contained the copy of the by-law duly certified by the clerk, as the foundation of this application, there was a copy of a report purporting to be addressed, on the 12th of August, 1845, by John Farquharson, surveyor to the District Council of the Home District, in which he recommended a new line of road to be established, of which the field notes, he said, "are as follows, viz., commencing," &c., and describing a line intended to be the centre line of the new road by courses and distances.

On the back of this copy the clerk certified that it was a copy of a report purporting to be made by J. Farquharson, a surveyor, being the report referred to in the by-law.

He did not state whether the report itself was annexed to the by-law, or whether he found it among the records and papers of his office.

On the part of the council it was shewn, in answer to this rule, that the road in question was clearly defined and marked

with fences on each side of it; that it had been established and travelled by the public for eight years, and connected with other roads leading through Whitby; that there had been statute labour or grants of public money expended on it, and that it was of great use to the inhabitants in its vicinity.

M. C. Cameron shewed cause, and cited 11 East 375

note a; Regina v. Spence et al., 11 U. C. R. 31.

Wilson, Q. C., contra, cited McIntyre v. Municipal Council of Bosanquet, 11 U. C. R. 460; Dennis v. Hughes et al., 8 U. C. R. 444; Brown v. Municipal Council of York, 8 U. C. R. 596; 5 Q. B. 94; Rex v. Trevenen, 2 B. & Al. 839; Rex v. Symmons, 4 T. R. 223; Rex v. Slythe, 6 B. & C. 240.

ROBINSON, C. J., delivered the judgment of the court.

For all that appears this applicant may have purchased the land long after the road was opened and in use. What is complained of in this by-law is not so much an illegality as a defect; by which I mean, that in passing it the municipality were doing nothing beyond their powers, and were committing no wrong. But they have not made their by-laws so complete in itself as to guard against the objection of uncertainty and informality.

In such a case we think it not unreasonable to hold, that a party seeking to set it aside directly, by the summary intervention of this court, should not delay as many years as he chooses, but should come within a reasonable time. Here nine years or more have elapsed; public expense has been incurred in improving and maintaining this road, the intended bounds of which seem to have been well marked out on the ground, and to have been so long acquiesced in by the defendants that there might be ground for contending that the road could be supported on the footing of a dedication.

The inconvenience to the public might be very serious, of allowing a party interested to lie by for so many years, and then to claim as of right to have the road abolished, which he had most probably been using himself in common with the public, and upon which, in the meantime, a valuable bridge may have been erected, or other costly improvements made.

The statute makes it lawful for the court to set aside a bylaw where they see sufficient grounds, but it does not make it strictly imperative. We therefore discharge this rule, but not with costs; and in taking this course we are not determining whether this is or is not a legally established highway.

Rule discharged.

HOWLAND V. BETHUNE.

Steamboat owner-Liability for goods-Limited Partnership Act, 12 Vic.ch. 75.

A box was put on board the defendant's steamer, some of the men employed on the steamer assisting to carry it on board. It was not delivered to any officer of the boat, but as the steamer was starting a bill of lading for it was handed to the purser. No receipt was given, but it was shewn that this was not customary until the return of the steamer. The bill of lading was handed by the purser to the wharfinger at Port Credit, and on the return trip was handed back to him, with the information that the box had not been delivered there.

Held, that the defendant was liable; for the bill of lading was notice that the shipper considered the box as being on board, and it should have been ascertained how the fact was before landing at Port Credit.

The defendant was described in the declaration as the general partner of the firm of D. B. & Co, and evidence was given that the steamer was understood to be owned by D. B. & Co.—Held, sufficient to charge defendant, there being no plea in abatement.

Assumpsit. The plaintiff complained against the defendant, the general partner of the firm of Donald Bethune and Company. The declaration alleged that the defendant was the owner of a certain steamship called the "City of Hamilton," in the port of the city of Toronto; that on the 27th of October, 1853, the plaintiff shipped divers goods, to be taken care of and carried by the defendant on board of the said vessel from Toronto to Port Credit, to be safely and securely delivered to the plaintiff; and although the defendant received the goods to be so safely carried, and a reasonable time had elapsed for carrying the same, yet the defendant, not regarding his duty or his promise, did not safely carry the same, but the same were lost.

The defendant pleaded, first, non-assumpsit; secondly, that the plaintiff did not cause his goods to be shipped; thirdly, that the defendant did not receive the goods to be carried, as alleged.

At the last assizes, held in the city of Toronto, the cause was tried before *Richards*, *J*:, and the facts proved in evidence were these: The plaintiff Peleg Howland, lived and carried on business at Brampton; and a brother of his, William P. Howland, carried on business at the Humber. Goods pur-

chased by those persons living at the Humber are transported thither from the city of Toronto by teams, no steamer stopping at the Humber. Goods sent by the steamer from the city of Toronto, intended for Brampton, are landed in the course of business at Port Credit. The plaintiff purchased a quantity of goods from Mr. Lumley, in Toronto, on the 26th of October, 1853, and directed them to be shipped on the "City of Hamilton." The box containing the goods was addressed "W. P. H-B," and was delivered on the 26th of October to Messrs. Borst & Co., wharfingers at Toronto, they giving a receipt for the box, stating it to be forwarded viâ Port Credit. It was proved by the clerk of Messrs. Borst & Co. that the box was put on board the steamer on the 27th of October, and he stated that some of the hands of the vessel assisted to put it on board. There was no delivery to the purser, or mate, or any known officer of the boat, but simply it was stated that the box with other goods was put on board, addressed as aforesaid, and was assisted on board by some of the men belonging to the steamer. It was proved by the clerk of Borst & Co. that he did not see the purser of the steamer that day, when he put the box on board, but just as the steamer was leaving the wharf he handed to the purser bills of lading of the different goods put on board. Among others that of the box in question was handed to him. contained no date, but simply said 1 case, marked W. P. H. owned by W. P. Howland, Brampton, not containing any direction where it was to be left. No receipt was given by any one belonging to the steamer. It was proved on the part of the defence that the custom was not to give receipts for parcels sent on board until the return of the steamer, as the time is very short at the different places of stopping between Toronto and Hamilton. The custom was to put the goods intended for the different ports in separate places, and when the steamer has left Toronto, to collect near the gangway those to be landed first, and so on, and that the mate attends to receiving goods on board and discharging them. On the day in question the purser of the steamer stated that he left with the wharfinger at Port Credit the different bills of lading of goods sent by the boat that day, and among others the bill

of lading already mentioned. On the return trip of the boat the bill of lading of the box in question was handed back to the purser of the boat, with the information that the box had never been delivered there. The purser immediately gave notice to Messrs. Burst & Co., and search was made for it at the different places the steamer landed goods at, but it could not be found.

The evidence with regard to the ownership of the boat was general—that it was understood the steamer was owned by Donald Bethune & Co. The agent of the defendant was applied to after the loss of the box, and he was informed the defendant would be sued, and he asked for time, stating that probably in a short time the box would be forthcoming.

It was objected at the trial that if the evidence established that Donald Bethune and Company were the owners of the steamer, then the defendant was not liable alone; that the evidence was insufficient to prove that the steamer was owned by either Donald Bethune and Company or the defendant solely; and that no contract, in fact, to carry the goods was established; and if any contract was established, it was not to carry to Port Credit, but to Brampton. It was further objected, that no sufficient delivery of the goods on board the vessel was established to charge the defendant.

The learned judge directed the jury, first, that they must be satisfied the goods in question belonged to the plaintiff; secondly that they were put on board of the steamer, and that the steamer belonged to the defendant; thirdly, that the goods were in the course of the usual business to be delivered at Port Crodit. The learned judge told the jury that delivery on board the steamer to the defendant's servants was sufficient to charge him, and that he, as a common carrier, was bound to carry the box if delivered safely; and if not delivered at Port Credit, if it were the course of business to deliver there, the defendant was answerable.

The jury found for the plaintiff, damages £50 0s. 9d.

Phillpotts obtained a rule to shew cause why the verdict should not be set aside as being contrary to law and evidence, and for misdirection.

Bell shewed cause.

Burns, J.—The declaration appears to be framed as if to charge the defendant as being the head of a firm under the Limited Partnership Act (12 Vic. c. 75). The eleventh section. enacts that "suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners." Whether the declaration be sufficient to render any of the special partners, if there be any, liable, by reason of any ulterior proceedings, is not for us now to inquire into. It is quite true there is no allegations that the suit is brought against the defendant as the general partner of a united partnership composed of general and special partners. If there were other general partners, who should have been sued with the defendant, then he should have pleaded in abatement the non-joinder of such persons, just as he would have had to do independent of the Limited Partnership Act. If the evidence does establish that there are more owners than the defendant, then it may be a case under the act, in which there are special partners who need not be named in the suit; or if there be more general partners than the defendant, then the same rule would prevail as in other cases, that the defendant should plead in abatement.

The only other point relied upon in the argument is, that it should have been shewn the goods were delivered on board the steamer to some person known to be an officer of the boat, or some person whose duty it was to take charge of the goods. We are not disposed to think that goods can be put on board a steamer, as was done in this case, without notice being in some way brought to the knowledge of some one whose duty it is to see after the goods, and that thereupon the owners must be held responsible for the safe carriage. The present case differs from that position. In addition to the goods being put on board, as was sworn to, a bill of lading was delivered to the purser of the steamer just as the boat was leaving the wharf. It was proved to be the custom that receipts were not given on the part of the proprietors of the vessel until the return trip, owing to the shortness of time for receiving and delivering goods. The delivery of a bill of lading to the purser was notice, however, to him that the shipper considered that the box had been put on board; and though that bill of

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lading was delivered just as the boat was leaving the wharf, the question is, from the nature of the business as carried on in this case, did that fact impose any obligation on the persons in charge of the steamer. The purser in the present instance acted as if the box in question had been on board. He took it for granted it must be there, and would be put ashore at Port Credit, for he, as he stated, delivered the bill of lading to the wharfinger at Port Credit, supposing the box to be put ashore with the other goods for that place. He afterwards, on the return of the vessel, assumed that it was not put ashore, because the next day he was told by the wharfinger at Port Credit that the box had not been received. Whether, in fact, the box had or not been put ashore at Port Credit, depended upon the assertion of the wharfinger at that place. He was not called upon to prove that it had not been landed, and the defendant relied upon the purser stating that he had been informed by the other that it had not been landed there. Where those in charge of the steamer have been to blame is in not ascertaining, before arriving at Port Credit, whether there was or not a box corresponding to the bill of lading which had been handed to the purser. If no bill of lading had been delivered, then it might be that the evidence would be insufficient to charge the defendant, because the defence is. that in fact the box had never been put on board the vessel; but the bill of lading was such information to the purser as should have caused him to ascertain, before the landing of goods at Port Credit, whether the information were correct or not; and that might have been ascertained before reaching the wharf, or at all events it was very easy to check the packages on being put ashore with the bill of lading. The defendant, according to the evidence and the custom of the business, has rendered himself prima facie liable; and to excuse that liability he should either have been able, from the circumstances mentioned, to repel the evidence of the box being put on board the vessel, or should have been able to provide the plaintiff with a remedy against some other person, neither of which was attempted in this case. We think the verdict should stand, and the rule be discharged.

DRAPER, J., concurred.

Rule discharged (a).

⁽a) The Chief Justice having been absent last term when the rule was argued, gave no judgment.

REAUME ET AL. V. GUICHARD.

Deed-Condition-Sheriff's sale.

Where lands were held by A. upon express condition to alienate only to his children; and under an execution against him the sheriff sold and conveyed his interest by a deed sufficient to pass the fee—

Held, not a breach of the condition.

EJECTMENT for two parcels of land, part of lot 85, 1st concession of Sandwich, described by metes and bounds, being pieces of land formerly occupied by one Joseph McDougall, deceased. The trial took place at Sandwich, in May last, before McLean, J. The title of Joseph McDougall in feesimple in these premises was admitted. The plaintiffs claimed under a deed from him, dated the 2nd of November, 1837, to James McDougall, whereby, in consideration of £500, Joseph McDougall did grant, bargain, sell, release, and confirm unto James McDougall, his heirs and assigns, the premises in question, among other lands, with the express condition that the said lands should not be sold or conveyed to any person or persons, except to his own children in equal shares, after the death of the said James McDougall, Habendum to the said James McDougall, his heirs and assigns, to the sole and proper use, benefit and behoof of the said James McDougall, his heirs and assigns for ever: registered on the 7th of November, 1837. It was admitted that James McDougall was living: that the three female plaintiffs were his only children; and it was further admitted and proved that Louis Joseph Fluette recorded a judgment in assumpsit against James McDougall in the Queen's Bench, on which judgment Fluette regularly issued a Fi. Fa. against lands, tested the 19th of August, 1843, for £22 11s. 4d., residue of the damages, &c.: upon which writ the sheriff sold the land in question to the defendant; and by deed dated the 11th of December, 1844, conveyed to him, his heirs and assigns, the same lands, and all the estate, right, title, and interest which James McDougall had in the premises on the 6th of November, 1844, or at any time since, or at the date of the deed: Habendum to the said defendant, his heirs and assigns for ever, as fully and absolutely as the said sheriff might, could, or ought to sell and convey the same, and no more;

registered on the 13th of December, 1844. The plaintiffs contended that the deed amounted to a violation of the condition expressed in the deed from Joseph McDougall to James McDougall, in which condition the grantee, James McDougall, must be held to have acquiesced; and that he could no longer claim any interest in the premises, and as a consequence the land became the property of his children. The learned judge nonsuited the plaintiffs, with leave to move.

Cooper, in Easter Term, obtained a rule nisi accordingly, to which A. Prince shewed cause.

DRAPER, J .- I do not understand upon what ground the plaintiffs can be held entitled to recover. The deed from the sheriff can only enure to pass such estate or interest as James McDougall took in these premises; and therefore, if he was only tenant for life, only an estate for life would pass, and the present plaintiffs have no right or interest while that estate continues. No doubt the sheriff's deed contains words large enough to pass a fee, if the execution debtor were seised in fee; and if that conveyance had been made by himself and not by the sheriff, it might be well argued that it shewed an intention to dispose of the fee, and so would bring up what the plaintiffs, as I understand, desire to urgenamely, that James McDougall was only tenant for life, or upon express condition only to alienate in a particular way; and that his execution of such a conveyance was a forfeiture of the life estate, or a breach of the condition, for which those in remainder might enter. But it appears to me the sheriff's deed ought not to be construed as purporting or intending to convey a fee-simple, unless the execution debtor had a fee-simple; though it may be said that it must purport and intend to convey some estate of freehold, because if the debtor had only a chattel interest, that could not be taken or sold upon an execution against lands and tenements, as was decided many years ago in this court. Among the numerous cases (in equity) cited by Mr. Cooper, none touch this point; and Doe v. Carter (8 T. R. 57) is a clear authority to shew that, even if the sheriff's deed must receive a more extended construction than I think it right or necessary to give it, yet

the proceeding would be looked upon, in respect to James McDougal, as in invitum, and would operate no forfeiture—Doe v. Bevan (3 M. & S. 353) recognizes and upholds Doe v. Carter. This renders it quite unnecessary to determine what estate James McDougall took, whether for life or in fee, subject to a condition at law, or upon a trust for the benefit of all or any of his children. I think this rule should be discharged.

Burns, J., concurred.

Rule discharged (a).

BARNUM V. TURNBULL.

Promissory note—Several payments—Mode of computing interest.

Where various payments had been made upon a note payable with interest, not always sufficient to cover the interest due at each time of payment: Held, that the usual mode of adding the interest to the principal, deducting the payment and charging interest on the balance, could not be adopted; but that interest-could only be computed on the balance of principal remaining due at each payment.

This was an action of assumpsit upon a promissory note for £121 11s. 4d., dated 22nd May, 1848, and payable eighteen months after date, with interest. Pleas—payment of all but £80 2s $8\frac{1}{2}d$., as to which a tender before action brought was pleaded.

At the trial before Burns, J., at the last assizes held at Belleville, the dispute between the parties was as to the mode of computing the interest due upon the note. There had been various payments made from time to time, and the mode of computation adopted by the plaintiff was, to add interest to the principal up to the time of a payment made, and then deduct the amount paid, and then compute interest on the balance up to the next payment, and so on. By this mode of computation the plaintiff made out that at the time of the action brought there was still due upon the note the sum of two pounds above the sum tendered. The defendant computed the interest upon the principal up to the time of payment made, and then again upon the remaining principal sum up to

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

the next payment, and only deducted from the principal sum when the excess of the payment made exceeded the amount of interest due at the time of payment, and by this mode of computation he made out that there was nothing due to the plaintiff. A verdict was entered for the plaintiff for forty shillings, subject to the opinion of the court; and if they should consider that the mode adopted by the defendant was the correct mode, then the verdict to be entered for the defendant.

Wallbridge, accordingly, last term obtained a rule nisi to enter a verdict for the defendant, to which no one shewed cause.

Burns, J., delivered the judgment of the court.

There can be no doubt the mode adopted by the plaintiff in computing the interest cannot be sustained. He has taken the method adopted by merchants in rendering yearly or periodical accounts, where in the course of business it may be urged that, if an account be not discharged at the periodical time of rendering, the item of interest then charged becomes a new item of account, and entitled to bear interest again. I do not say whether such mode can be sanctioned by law, independent of the dealings of the parties; but perhaps the parties may so deal with each other as to sanction the idea of a contract to that effect. This case, however, is very different. The contract is to pay a specific sum at a specific time, with interest. If the payments made had always exceeded the interest due, then there would be no necessity for keeping a separate statement of an interest account, for it would be obvious enough that any balance due could only be principal. But in this case, where the payment made was often not sufficient to discharge the interest due at the time, then adding the interest to the principal and deducting the payment, and then computing interest on the balance, amounts to and is a computation of compound interest. The computation adopted by the defendant is the correct mode-allowing the payment made only to sink so much of the principal as the payment exceeds the interest due, and then computing interest on the balance. Judgment should be entered for defendant.

Rule absolute.

IN RE MORRISON AND THE MUNICIPALITY OF THE TOWNSHIP OF ARTHUR.

13 & 14 Vic. ch. 48, sec. 18, sub-sec. 4-By-law uniting school sections.

A school section in a township cannot be altered by the municipality without the request of the majority of the freeholders and householders in each section affected, expressed at a meeting called by the trustees for that purpose; and the want of such meeting and request is a sufficient ground for quashing the by-law,—(but see note a at the end of this case.)

S. M. Jarvis, in Hilary Term, obtained a rule calling on the Municipality of the Township of Arthur to shew cause why by-law number 2, passed on the 5th of February, 1853, should not be quashed, on the ground that it alters the school sections of the township of Arthur, as previously established, and yet was not submitted to a meeting of the householders or freeholders of the school sections of the township; and that the inhabitant householders and freeholders have not assented to such alteration at any meeting duly called for the purpose of obtaining their consent.

The rule was granted on reading the by-law and two affidavits; one of which stated, that previous to the passing this by-law, the township of Arthur was divided into four school sections by a by-law passed on the 14th of October, 1850: that on the second Wednesday in January, 1853, the regular anuual meeting for the election of a third school-trustee for school section number 3, in lieu of the retiring trustee, was held, and the applicant Morrison was elected such third trustee: that the alteration made by the by-law moved against materially affects the previous section number 3, and alters every school section as constituted by the by-laws of October, 1850: that previous to the passing of the by law moved against, no public meeting of the freeholders or householders in the section number 3 was ever called by the deponent Morrison, or his co-trustees, or either of them, to obtain their opinion as to the propriety of altering the division of the school sections; and no requisition was made, to his knowledge, to call any such meeting; nor had he ever heard that any such meeting was held or opinion expressed: that deponeut and his co-trustees had never consented to any such

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

alteration, but had endeavoured to maintain their corporate authority; and on the 4th of January last (1853), called a public meeting, to be held on Wednesday, the 11th of January, (1853), to elect a school trustee; that the meeting was held, but refused to elect a trustee. A second affidavit confirmed the principal facts above stated.

This rule was originally moved in Easter Term, 17 Vic., and was granted on the second Wednesday after term. By some inadvertence, after the rule was served, and in which both parties shared, that rule was allowed to lapse; and on the facts being stated to the court, the present rule was granted.

During this term Wilson, Q. C., shewed cause. He argued that the court should not interfere, no objection appearing on the face of the by-law, and that the lapse of time since it was passed ought also prevent interference; that delay, as well as any acquiescence in the by-law, ahould be considered. He cited Sutherland v. The Municipality of East Nissouri, 10 U. C. R. 626; Chief Superintendent of Schoools v. McRae, 12 U. C. R. 525; Regina v. Preece, 5 Q. B. 94; Rex v. Trevenen, 2 B. & Al. 339; Rex v. Symmons, 6 B. & C. 240; Rex v. Slythe, 4 T. R. 223.

He filed an affidavit of Michael Cox, the township clerk, that originally there were five school sections in the township; that the inhabitants petitioned the council to reduce the number to three (the original petition was annexed to his affidavit), and in accordance therewith by-law number 1 passed the council, whereby three school sections were established: that the same council, in the same year, passed by-law number 12, whereby the number of school sections was increased to four, which by-law was passed without any previous meeting of the householders, &c.: that the council of 1853 passed the by-law complained against: that he verbally and in writing requested the trustees to call a meeting as required by statute, but they "absolutely refused and neglected to call such meeting,"—with a good deal more which is not relevant to this application.

Jarvis, in reply, as to delay, urged that the by-law was not to take effect until December, 1853, and the rule was first moved in the following Easter term; that it stands admitted that there was no public meeting, which the statute requires.

DRAPER, J.—The question which really presents itself for our determination in the first instance is, whether on the circumstances before us we have authority to quash this by-law. The 13th and 14th Vic. ch. 48, sec. 18, among other duties imposed on the municipality of each township, in regard to common schools, states—4thly, To alter any school section already established, and to unite two or more school sections into one at the request of the majority of the freeholders or householders in each of such sections, expressed at a public meeting called by the trustees for that purpose. It is contended that the request expressed at a public meeting is a condition precedent to the exercise of this power, or, in other words, that no power or authority to pass such a by-law is given to the municipality until such a request has been so expressed.

Assuming, for the sake of argument, that this is so, has the court power on such a ground to quash the by-law? The 155th section of the 12 Vic. ch. 81 points out the mode of obtaining a certified copy of any by-law, and enacts that either of the superior courts of common lawat Toronto may be moved, upon production of such copy, &c., to quash such by-law; and if it shall appear to the court that such by-law is in the whole or in part illegal, it shall be lawful, upon proof of service, &c., to order such by-law to be quashed in the whole or in part.

It is observed by the Chief Justice in giving judgment in Sutherland v. The Municipality of East Nissouri (10 U. C. R. 628,) that this provision does not seem to contemplate the case of a by-law complained of on grounds wholly apart from the nature of its provisions. There may be many objections to a by-law, and which would be sufficient to deprive it of validity, which at the same time may not be found sufficient to justify the interference of the court in the summary manner given by the act; as for instance, when the objection is to the reasonableness of the by-law, which requires the aid of extrinsic matter to demonstrate the existence and force of the objection.

It seems to me, however, that where certain proceedings, emanating not from themselves, but from (probably) a limited portion of their constituents, are by express terms of an act of Parliament rendered necessary, in order to give authority to

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the municipal council to pass a by-law relating to a porticular subject, and they nevertheless do pass such a by-law, without any such proceedings having taken place, and the absence of such proceedings is clearly established on an application to the court to set aside the by-law, the statutory jurisdiction attaches, and the by-law may well be deemed illegal in the whole. And this accords with what was said by the Chief Justice in giving judgment in Lafferty v. The Municipal Council of Wentworth and Halton (8 U. C. R. 232).

I think this case falls within the same principle, and that the summary jurisdiction given by the statute may be resorted to, for the purpose of quashing a by-law passed under such circumstances.

Then, as to the objection itself; The language of the statute already quoted appears to me clearly to limit the authority of the municipal council to pass such a by-law, without a request first made to them for that purpose by the parties, and in the manner designated; that is, that a request of a majority of the freeholders in the school sections to be affected by the change must be expressed at a public meeting, to be convened by the school trustees for that purpose. No such meeting, and consequently no such request, preceded the passing of this by-law. In my opinion, therefore, it should be quashed.

Burns, J., concurred.

Rule absolute (a).

⁽a) The Chief Justice having been absent when the rule was argued, gave no judgment.

This case has been since overruled by the case of Nessand The Municipality of Saltfleet, decided at the sittings after Michaelmas Term (December 12th), in which it was held by Robinson, C. J., and Burns, J., that the request of the freeholders and householders mentioned in this clause (sec. 18) applies only to the union of two or more sections into one, and not to the alteration of the boundaries of school sections in the same township, which may be made without such request on complying with the requisites in provise 2 of subsec. 4.—Draper, J. dissented from the majority of the court, and continued of the opinion expressed by him in this judgment.

POMEROY V. DENNISON.

Ejectment-Estoppel-Payment of rent.

Defendant rented the land in question from P. for five years, but paid all the rent to A., except for the last year and a half, which he paid to B. The first of the payments to B. was made with A.'s assent. The plaintiff claiming under a deed from A., made after this payment, brought ejectment. Held, that the payment so made to B. formed no defence to this action.

EJECTMENT for part of the north half of lot number twelve, 1st concession, and for the rear part of lot number thirteen, 1st concession, township of Hamilton.

The trial took place at Cobourg, in April, 1855, before Burns, J. The defendant was called as a witness, and stated that he took a lease of the premises in question from Dr. Pringle for five years, which ended on the 31st of March, 1855, and paid him no rent, but paid all the rent, excepting for the last year and a half of the term, to Dr. James Auston. The rent for the last year and a half he paid to one Beamish, to whom he delivered up possession some time after the expiration of the term of five years. He said that he paid rent to Auston as long as he owned the place, and afterwards paid Beamish. The lease being produced, contains nothing to affect the question raised in the cause. The plaintiff also put in an indenture, dated 4th of March, 1854, made between James Auston, of the one part, and Joseph Hall Dean, of the other part; whereby-after reciting divers conveyances of the lands in question and of other lands, whereby James Austin was mortgagee of these and other premises mentioned in that deed, and one Joseph Hall Dean was entitled to the equity of redemption, and that Dean had obtained a decree to redeem on payment of, &c. the indenture witnessed that Auston, in consideration of the sum named in the decree, conveyed to Dean in fee. The plaintiff put in another deed from Dean to himself, in fee, for the premises claimed in this action, and rested his case there, insisting that, as the defendant had paid all rent due under the lease to himself from Pringle to Auston, he had acknowledged himself to be Auston's tenant thereby, and could not deny the right of Auston's assignee to recover possession at the expiration of the term. A verdict was taken for the plaintiff, with leave reserved to the defendant to move

to enter a nonsuit, and Vankoughnet, Q. C., moved accordingly.

J. D. Armour shewed cause, and during the argument admitted that the first payment of rent to Beamish, which was for the six months ending on the first of March, 1854, was so paid by the defendant with the consent of Auston; on which Vankoughnet, Q. C., insisted that put the plaintiff out of court, as it put an end to the only claim or pretence of title shewn to Auston, inasmuch as no conveyance from Pringle to him was proved; and whatever right he might have to the rent being by his own admission transferred to another, before the date of the deed from Auston to Dean, there was nothing to shew that he retained any estate or interest which could pass by Auston's deed of the 4th of March, 1854.

DRAPER, J.—It is only by treating the payment of rent by the defendant to Auston as an admission of title in him, or as a quasi estoppel to deny such title in him, that the plaintiff makes any case at all. That the payment of rent amounts to an admission that the party to whom it is paid has a right to receive it, and if it be unaccompanied by any explanatory circumstances, that it should be treated as an admission that the premises for which the rent is paid are held of and from that party, is sufficiently clear .- Cooper v. Blandy (1 Bing. N. C. 45). I do not think that the proof that the defendant got possession of the premises by a lease from Pringle for five years is sufficient to destroy the presumption of title in Auston, which arises from the fact that the first seven half-yearly payments of the rent accruing under that lease were made to Auston. And the only thing that created any difficulty in my mind was the admission that the payment of rent (being the eighth half-yearly payment due under the lease) was made to Beamish with Auston's consent, which implied a transfer of Auston's right to Beamish. But it is proved that Auston has since that payment made a formal deed and conveyance of the premises to a party from whom the present plaintiff derives title; and in our opinion the proof of that fact is enough to outweigh any presumption that might otherwise arise from the payment made to Beamish with Auston's consent.

Then the case would stand thus:—The defendant has, by payment of rent, acknowledged Auston as his landlord; and he defends an ejectment, brought after the expiration of the lease under which the defendant held, by a party who proves that whatever title Auston had has been vested in him; and against that the defendant shews only a payment of rent to Beamish, once with the consent of Auston, twice without it. Whatever effect might have been given to these payments if the litigation were between the defendant and Beamish, is not now the question. The point for decision is, whether they afford a defence to an action brought by the assignee of Auston.

In our opinion they do not, and therefore the rule should be discharged.

Burns, J., concurred.

Rule discharged (a).

CAREY V. LAWLESS.

A postpuaster is liable to the party injured for loss caused by his negligence in the transmission of letters.

CASE.—The first count stated, that whereas before and at the times of the committing of the grievances, &c., the defendant was the postmaster in and for the town of London, in the county of Middlesex, and Province of Canada, duly authorized and appointed to act as such postmaster; and it was the duty of the defendant, as such postmaster as aforesaid, amongst other things, to receive letters, and duly, safely, and without delay, to mail and transmit the same to their proper and respective places of destination, and to the person or persons to whom the same were respectively directed and addressed; and the defendant, being such postmaster as aforesaid, heretofore, to wit, on fhe 21th of January, 1854, received a certain letter directed and addressed to the plaintiff at Darlington P. O., meaning, &c., and containing £17 18s. 12d. of lawful money of Canada, and by him the said defendant, as such postmaster as aforesaid, to be safely, securely, and without delay, mailed and transmitted from the

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

town of London aforesaid, to the township of Darlington aforesaid; and it then became and was the duty of the defendant as such postmaster as aforesaid, safely, securely, and without delay, to mail and transmit, or caused to be mailed and transmitted, to the said plaintiff, the said letter so containing the said money, and directed and addressed to the said plaintiff at the township of Darlington aforesaid, being the place of destination of the said letter, and its contents aforesaid. Yet the defendant, not regarding his said duty as such postmaster as aforesaid, did not nor would safely. &c., mail and transmit, or cause to be mailed and transmitted, the said letter, and its contents aforesaid, to the said plaintiff at the township of Darlington aforesaid; but on the contrary thereof, he, the said defendant, as such postmaster as aforesaid, so carelessly, negligently, and improperly behaved and conducted himself in that behalf, that by and though the carelessness, negligence, and default of the defendant in the premises, the said letter and its contents aforesaid, being the said sum of £17 18s. $1\frac{1}{2}d$., became and were and are wholly lost to the plaintiff.

The second count alleged that the defendant, at his special instance and request, had the care and custody of a certain other letter of the said plaintiff; yet the said defendant, not regarding his duty in that behalf, did not nor would, whilst he so had the care and custody of the said last-mentioned letter and its contents aforesaid, take due and proper care of the same or any part thereof, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit, on the day and year aforesaid, the last-mentioned letter and its contents aforesaid became and were wholly lost:—to the plaintiff's damage, &c.

Demurrer—assigning for causes, as to the first count, that in and by the said first count it is alleged that the said defendant was postmaster, &c., and that a certain letter was placed in his, the defendant's post office, &c.; by which statement it fully appears that no cause of action whatever exists against the said defendant; that the said first count contains no statement or allegation of the liability of the said defendant, independent of his duties as postmaster. To

the second count, that the same does not state or set forth any legal liability of the said defendant, and that the said defendant, as such postmaster, is not therefore liable for the accidents and miscarriage of letters and papers deposited in her Majesty's post-office and mails.

O'Connor, for the demurrer, cited 14 & 15 Vic. ch. 71, sec.

19; Story on Agency, 267 & 272.

J. D. Armour, contra, cited Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, Cowp. 754; Campbell v. McPherson, 6 O. S. 34.

DRAPER, J., delivered the judgment of the court.

In Whitfield v. Lord Le Despencer (Cowp. 765), Lord Mansfield says, "as to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable. So is the sorter in the business of his department. So is the postmaster for any fault of his own."

If this be law, and I never heard it questioned, it seems difficult to sustain the causes of demurrer to the first count; namely, that it alleges that the defendant was postmaster, and that a letter was placed in the post office, "by which statement it fully appears that no cause of action whatever exists against the defendant:" that the first count contains no statement of the liability of the defendant independent of his duties of postmaster. If a letter being sent to the post-office can be lost or destroyed by the negligence of the postmaster under circumstances not amounting to felony, I do not understand why the postmaster is not to answer for it in damages to the party injured.

The second count merely states that defendant, at his own request, had the care and custody of a letter containing £17 18s. $1\frac{1}{2}d$, yet he did not take proper care of it, but neglected so to do, whereby the letter became lost. This is demurred to because it does not set forth any legal liability of defendant; and that defendant, as such postmaster, is not liable for

the damages and miscarriages of letters and papers deposited in her Majesty's post-office mails. But the second count says not a word about defendant being postmaster, or the letter coming into his hands in that capacity. It treats him as a mere bailee without reward, and no objection is taken to the count viewed in that light.

Judgment for plaintiff on demurrer.

GOODERHAM ET AL. V. JOSEPH LAWSON, JOHN LAWSON, AND THOMAS LAWSON.

Promissory note-Pleading-Immaterial issue.

To an action on a promissory note by indorsees against the makers and indorser, defendants pleaded, that before the note came into plaintiffs' hands it was delivered to J. H. & Sons, and by them delivered to the plaintiffs as security for certain moneys and flour to be delivered by J. H. & Sons to the plaintiffs; that, after it became due, and while it was in plaintiffs' possession, J. H. & Sons and the plaintiffs had an accounting together, in which this note was included and satisfied, and plaintiffs afterwards held it only asagents for J. H. & Sons; that while they so held it, the makers accounted with J. H. & Sons, and satisfied this note to them.

The plaintiffs replied that they received the note from the endorser, absque hoc that was delivered by J. H. & Sons to them for the special purpose

mentioned in the plea.

Reld, on demurrer, replication bad, as tendering an immaterial issue.

The plaintiffs in their first count declared as endorsers of a promissory note, dated 9th of October, 1850, for £361 11s. 10d., payable at 30 days after date, made by defendants Joseph Lawson and John Lawson, in favour of defendant Thomas Lawson, or order, and by him endorsed to plaintiffs. In the second count they declared as indorsers of a bill of exchange for £120, drawn by Thomas Lawson upon and accepted by Joseph and John Lawson, payable to the drawer, or his order, fifteen days after date, and endorsed by him to the plaintiffs.

Pleas—to the 1st count, that after the making and endorsement of the note, and before it came into plaintiffs' hands, and before the commencement, &c., the note was delivered to the firm of J. H. & Sons, and J. H. & Sons delivered it to the plaintiffs as security to the plaintiffs for certain moneys and flour to be thereafter delivered by J. H. & Sons to the plaintiffs; that after the note became due, and while the

plaintiffs held it, and before the commencement, &c. J. H. & Sons accounted with the plaintiff concerning such money and flour, and concerning other demands between the plaintiffs and J. H. & Sons, and of J. H. & Sons against the plaintiffs, and by that accounting the note, and all the moneys due thereon by J. H. & Sons to the plaintiffs. and all damages for non-payment of the note, were taken into account, and the plaintiffs released the said note from all the securities for which it had been taken from J. H. & Sons, and the plaintiffs' claims on the note were extinguished; that since such satisfaction the note has remained in the plaintiffs' hands without consideration; and the plaintiffs have ever since held it as agents for J. H. & Sons; that while the plaintiffs so held the note, after its being satisfied, &c., the defendants J. L. and J. L. accounted with J. H. & Sons, concerning the said note and other things, and afterwards, to wit, on, &c., made a note for £615 10s. payable to the defendant T. L., or order, one month after date, who endorsed it, and delivered it to J. H. & Sons, in satisfaction, among other things, of the note declared on, and J. H. & Sons accepted the same in such satisfaction: verification.

Replication-That the plaintiffs received the note from Thomas Lawson; absque hoc, that it was delivered by J. H. & Sons to them for the special purpose in the plea mentioned: which was demurred to, on the grounds-1st, That it tenders an immaterial issue on the special purpose. 2ndly, That the substance of the plea is, that defendants made accord and satisfaction of the note to J. H. & Sons, and that J. H. & Sons satisfied the plaintiffs for the note, and issue should have been taken on one or other of these allegations; that it is immaterial to the defence whether the plaintiffs took the note as an absolute purchase or only in security. 3rd, That the plea admits title in the plaintiffs, and accord and satisfaction while in their hands; that such admission sufficiently confesses their cause of action, and cannot be traversed, and the discharge pleaded shows the avoidance. To the second count the defendants pleaded an exactly similar plea to the foregoing, to which the plaintiffs put in a similar replication, to which defendants demurred on similar grounds. To the second count

^{2 0-}VOL, XIII, Q. B.

defendants also pleaded, that after the drawing, accepting, and endorsement, of said bill of exchange, and before the same came into plaintiffs' hands, and before the commencement &c., the same was delivered to J. H. & Sons, who delivered the same to the plaintiffs as security for certain moneys and flour (as in the first plea): that after the bill became due, and while it was in plaintiffs' hands, and before the commencement, &c., defendants (the acceptors) accounted with J. H. & Sons and gave their promissory note for £615 10s. (as in the first plea), which J. H. & Sons accepted in satisfaction of the bill; and and that after such satisfaction, and before the commencement of this suit (stating an accounting between J. H. & Sons, in which the plaintiffs received credit for the amount of the bill, and that the plaintiffs claims on the bill were extinguished, -as in the first count); and that since such satisfaction the bill had remained in the plaintiffs' hands without consideration, and J. H. & Sons were entitled to have it, the plaintiffs held it only as their agent:-to which the plaintiffs put in a similar replication, and defendants a similar demurrer.

McMichael, for the demurrer. M. C. Cameron, contra.

DRAPER, J., delivered judgment of the court.

We think the replications clearly bad. They tender an immaterial issue. No exception is taken to the pleas, and if it be true that the plaintiffs, while holding the note and bill, were absolutely satisfied for all damages resulting from their not having been paid at maturity, and that the defendants, who made the note and accepted the bill, have by accord and satisfaction with the holders discharged themselves from all liability on these instruments, what answer is it that the plaintiff did or did not receive these securities for a special designated purpose? The utmost right they could have would be to the sum named in each instrument at its maturity, and if they recover this, or its equivalent, by accord and satisfaction before action brought, they are no longer in a position to maintain this suit.

Judgment for defendants on demurrer.

IN RE WM. BABY AND THE GREAT WESTERN RAILWAY CO.
CHARLES BABY " " " " "

G. W. R. W. Co.—Mandamus to appoint arbitrators—Obligations to purchase tand.

Held, that the Great Western Railway Company could not be compelled to purchase land, which had been enclosed by one of the engineers without the knowledge of the directors, but which they had never expressed any intention to acquire permanently.

Quære, whether if the Company had gone to arbitration upon the value, with the intention of taking the land, they could have been compelled to

complete the purchase.

In these three cases, application was made to the court for a writ of mandamus, to compel the Great Western Railway Company to nominate and appoint one or more indifferent person or persons, who together with some one or more indifferent person or persons appointed by the applicant, and one other person to be elected by ballot by the persons so named, or in case of their disagreement in manner provided by the statutes in that behalf, shall be arbitrators to award the sum of money which the said company shall pay to the party entitled to receive the same for the lands taken by the Company from and out of (describing the land,) or to award the sum of money which shall be so paid by the said Company for all damage done to the said land in consequence of the construction of the said railway thereupon, or the using and occupation thereof, and the taking material therefrom, in, for, and about the construction of the said railway.

The facts, which are stated in the judgment of the Chief Justice, seemed to be the same in all; and it was admitted in the argument that they all turned on one question, which was, whether the Railway Company (the defendants) could be compelled to take for their permanent use the land near the town of Chatham, which they had been for some time occupying for purposes relating to their railway, or whether they were at liberty to abandon the occupation, paying only a fair compensation for the use they had had of it, and any such damages as might be awarded under the statute, in respect of the land which they had entered upon and made use of, but which they did not desire to take for the permanent use of the railway.

The defendants had offered to go to arbitration on the footing last mentioned; but the plaintiffs respectively contended that they were entitled to insist on the company becoming purchasers of the land, and paying such sum as might be awarded for its value.

VanKoughnet, Q. C., shewed cause, and cited Regina v. London and South Western R. W. Co., 5 Railw. Cas. 669; 12 Q. B. 775, S. C.

O'Connor, contra, cited Sommerville v. Great Western Railway Company, 12 U. C. R. 304; Regina v. Birmingham, and Oxford Junction Railway Company, 15 Q. B. 634.

ROBINSON, C. J.—The affidavits are very similar in all the cases, and do not state fully the circumstances of the occupation from its commencement, nor what acts of the company the plaintiffs rely upon as indicating an intention to acquire the land for permanent purposes. We ought to see more clearly than we do what it is in each case, which in the opinion of the applicants binds the company to retain the land, and as a consequence to pay its value.

Since the argument in term affidavits have been filed, by consent, of Mr. Brydges, managing director of the Great Western Railway Company; of George L. Reid, Esquire, chief engineer of the company; and of Thomas C. Gregory, engineer in charge of the western division of the Great Western Railway, under the supervision of the chief engineer. These state in direct and positive terms that the land of the applicants never was taken, or intended to be taken or appropriated for the purposes of the railway, by any act of the directors, or with the sanction or knowledge of their engineer in charge; that it was never marked as taken for the company in any plan, map, or book of the railway company; and that it was unknown to them till lately that it was included within the company's fences, which appears to have been done by the direction of one Scott, formerly a divisional engineer of the company, who has since been dismissed; but such apparent approbation by them, was not, as it is sworn, communicated to the board or to their chief engineer, nor in any manner adopted or sanctioned by them.

The affidavits state further, that the land was used for a time for piling wood upon, and some earth had been taken from it for constructing the railway, but the fences have been removed and the land made level, and the company have expressed their willingness to pay for any damage done by their temporary occupation.

The Railway Clauses Consolidation Act, does not apply to this railway. We must therefore look at the several statutes which relate to the Great Western Railway Company-viz., 4 Wm. IV. ch. 29, secs. 3, 4, 5, & 7; 8 Vic. ch. 86, sec. 3; and and 16 Vic. ch. 99. None of these statutes make any more particular provision than that the company may take such land as they may require for the purposes of the railway; and may also enter upon lands adjacent to their railway, for the purpose of obtaining materials, or for placing materials thereon. Nothing is laid down as to what it shall be necessary or sufficient for the company or their officers to do, in order to indicate a resolution to appropriate permanently to the use of the railway any piece of land on which they may have entered; nor is there any provision to prevent them from relinquishing land which they may at one time have shewn an intention to acquire, but which they may afterwards find not to be necessary to be held by them permanently.

We have to look then at the reason of the thing, and certainly it does not appear reasonable, even where the company has plainly indicated an intention to acquire a certain piece of land for the use of the railway, that they should, in all cases, be bound to adhere to that intention. A change in their route, forced upon them by some unforeseen obstacle, or determined upon for other causes, might in many cases leave them without an object for holding the land, and so long as it has neither been conveyed on the one side, nor paid for on the other, it ought to be in their power to relinquish it, at least where they are not acting capriciously.

The owner of the land, when it is finally taken, can only justly expect to be paid its value, and that too after allowance has been made for the increased value given to his property in general by the railway. It would seem, then, no hardship upon him to allow him to keep his land, which the company may find that they have no occason to withhold from him after the completion of the railway, for we may suppose it to be worth as much as the company would have been obliged to pay him for it, and this without his being obliged to submit to any deduction, or make any compensation for the benefit conferred upon him by the railway.

The cases cited in the argument, in which the courts in England have been applied to for a mandamus to compel a railway company to take what they were not inclined to take, are cases plainly distinguishable from the present. They turn upon provisions very equitable in their nature, which have been made in English Acts of Parliament, under which a railway company, where they deprive an owner of part of a building, or of a part of any property so circumstanced that the part left can be of no use, or of little use, without that portion which has been taken away—is compelled to purchase and pay for the whole. Disputes have some times arisen, as to whether the facts relating to a particular property brought it fairly within such provision, and where the courts have concluded that the case came within the act, they have compelled the company to take the whole.

These are no cases of that kind. If the company had given some unequivocal evidence of their desiring at one time to purchase this property, I do not yet see that they could be obliged to persevere in that intention, and could not change their mind, however strong and reasonable might be the motive.

Indeed, the provisions in the acts seem inconsistent with such a position, for after the company has, in the plainest manner, claimed to take for permanent use any tract of land, and after the value has been ascertained by arbitration, the only consequence of their not paying that value seems to be, that the owner may resume possession of his land—that, at least, is what the statute provides.

But in these cases the applicants have not placed before us anything that we can hold to have been a clear indication of the company intending at any time to acquire the fee in these lands. They shew only that the narrow strip was for a time included within the fences along that part of the line, which might well have been without the directors or their engineer in charge being aware that it had been so enclosed; for there is a wide strip of land taken at that part, and it might easily escape observation that the fences included something more than the company had directed to be marked out for the permanent uses of the railway.

On the part of the company, it is sworn positively that neither the directors of the company, nor their principal engineer, directed or sanctioned the enclosing of this land; that it is now relinquished, and open to the occupation of the proprietors; and that the company have offered to go to arbitration, in order to have it determined what sum shall be paid by them for the use they have had of the land, and any damage they have occasioned to the proprietor.

It is impossible that, under these circumstances, we can grant the mandamus moved for.

Burns, J .- The application seems to be based upon the proposition that the relative position of vendor and vendee has been established, and all that remains to be done is, that the price of the land shall be fixed by arbitration, and the company having refused to arbitrate, the court will compel them to do so. The eleventh section of 4 W. IV. ch. 29 enacts, that the right of individuals shall not be interfered with without their consent first obtained, or by a reference authorized by the act. A consent may be given by any individual that his property may be taken or entered upon for the purposes of the railway, and some dispute may afterwards arise as to price or value, and then, in such case, I apprehend the position of vendor and vendee would be established, and the court would have the power to compel arbitration. Under the fifth section of the same act the company have power to enter upon and take lands, &c., doing as little damage as may be, and making compensation to the owners of lands, in the manner in the act mentioned. This section not only contemplates the lands which may be taken permanently by the company for the use of the railway, but also contemplates cases where the company may occupy the lands adjoining the

track temporarily for the purposes of the railway, and both of these matters may be the subject of arbitration. Under the fourth section the right of the company is declared to cease, both in respect to the rights to assume any property, and to commit any act, in respect of which a sum of money may be awarded, in case the company do not pay the sum awarded within three months from the time of the same being awarded; and it declares that it shall be lawful for the proprietor to resume his occupation, and to possess his rights fully, free from any claim or interference of the company. Whether this section is to be construed as giving the company a choice to pay the money, so that by refraining from payment they may remit the proprietor to his original rights, and thus avoid a purchase of lands; or whether it is to be construed in favour of the proprietors, that unless the company do pay within the three months the proprietors may either accept and compel performance of the award, or resume their property, is not material to the question presented in these cases. It is material, thus far, however, that it applies to cases both where lands may be required permanently, and where occupied only temporarily for the purposes of the road; and it is material to be considered how far certain acts are to be construed as establishing the position of vendor and vendee of the estate. The applicants Charles Baby and Ouillette do not pretend that there was any entry or taking of the land by or with their consent, so there is no such thing as establishing the position mentioned in that way. They say the company have fenced in the lands with their other lands, and used it with the other lands, as if for the permanent use of the railway, and consequently they are entitled to go to arbitration for its price, and the parties are placed in the position of vendor and vendee of the estate in the land. If that fact was not denied, the applicant would, I think, be right. On the part of the company it is denied that the land was required permanently for the railway, or that the company ever contemplated taking it. It is admitted that the company's engineer did, without authority of the company, and unknown to the board of directors, use the land in question for the purposes of the railway, and it is admitted that the company

should compensate the applicants for such occupation and for the injury they have sustained. We cannot grant a mandamus to appoint an arbitrator to ascertain such a claim on the company as may be made, for that is not the claim the applicants have made. I do not see that we can try the question whether the applicants are in the situation of vendors of this property and the company are vendors of it, upon affidavit, in a summary manner, on an application for a mandamus to appoint an arbitrator. I take it that position must, upon invoking the aid of the court, appear manifest on the proceedings, without placing the court in the position of trying it. Suppose, however, that the court might make preliminary investigation by way of trial, yet in this case the position which the applicants inferentially set up against the company is clearly met on the part of the company; and it is shewn there is no ground for inferring that the company are the purchasers of the land, though it is admitted they are liable for damages in having occupied it.

In the case where William Baby is applicant, he does state that the occupation was with his consent. He does not state, however, that such occupation was for the purpose of purchasing, though he says it was for permanently occupying the land. Though he gave his consent to the occupation, it is only inferentially from that fact, and from his saying the occupation was permanent, that he seeks to sustain the position that the company are purchasers. That occupation is explained in this, as in the other cases, as being by the engineer then employed by the company, without any authority, or the board of directors knowing that the land was so occupied. The company never did require it, and do not now, and are ready to compensate the applicant for the occupation. The allegation that the occupation was for a permanent purpose is denied, and therefore the argument that the company stands in the position of vendees of the estate in the land is not sustained.

I have not failed to look carefully over all the provisions of the different acts relating to this company, but I do not discover anything that affects the question otherwise than I have stated.

DRAPER, J.-I entirely concur in the judgment just pronounced, on the facts appearing. As to whether, if the company do take possession of land, and refer the question of value to arbitrators, by whom the price is determined, they can be compelled to complete the purchase, it is not necessary to give an opinion. I have seen several authorities, both at law and in equity, which seem strongly to support the affirmative; but here no such state of facts exist.

Rule discharged, with costs.

MARTINI V. GZOWSKI ET AL.

The Grand Trunk Railway Company served a notice on the plaintiff, stating that they required a portion of his land (describing it), and their readiness to pay a certain sum "as compensation for the fee simple of the said piece of land hereinbefore described," and that in case of refusal of such sum, proceedings would be taken by them to obtain a title; and also notithe provisions of the Railway Clauses Consolidation Act." The defendants, contractors under the company, entered upon the land, and commenced their work, soon after this notice. The plaintiff subsequently appointed an arbitrator, and an arbitration was held; but a few days before the award was made the plaintiff brought this action of trespass, and he afterwards refused to accept the sum awarded.

Held, that the notice was sufficient to entitle the company to proceed to arbitration, both upon the price of the land and the consequential damage resulting to the plaintiff from taking it,

Held, also, that neither the price nor such damage could be recovered in this action, but only the damage resulting from the entry and commencement of the work, which were premature and illegal.

Quære, whether the award need distinguish between the price of the land and the damages.

TRESPASS quare clausum fregit, being the west part of No. 7, north side of Snyder's road, in the township of Wilmot, cutting down trees, cutting and making holes and excavations, placing earth, stone, rubbish, stumps of trees logs, and wood, on the plaintiff's lands, encumbering the same and preventing the use thereof, trampling down and injuring grass, wheat, corn and herbage, subverting and spoiling the soil, and pulling down fences, whereby the close was deteriorated in value, and the plaintiff was prevented from using it in as beneficial a manner as he otherwise would. Plea, not guilty, by statute,

The trial took place at Berlin, before Draper, J., in May, 1855. It was proved that the defendants entered upon the

plaintiff's close, and begun and had gone on with the construction of the Grand Trunk Railway across it, digging, embanking, &e., and throwing down plaintiff's fences which were on the line occupied and taken possession of for the railway. The quantity of land so taken possession of and occupied, and on which the digging and embankments and the direct trespasses were committed, being two acres and $\frac{11}{100}$ The plaintiff claimed to recover damage for the general deterioration of his farm, by its being crossed and encumbered by the railway, and also particular damage for the loss of crops, &c., on both of which he gave evidence. On the defence it was shewn that on the 1st of September, 1854, a notice, dated June, 1854, and signed by the agent of the Grand Trunk Railway Company, was served on the plaintiff, stating that they required the land of which defendants actually took possession, (describing it) and stating their readiness to pay a named sum "as compensation for the fee simple of the said piece of land hereinbefore described," and giving notice that in case of non-acceptance of that sum, &c., proceedings would be taken by the company for the purpose of obtaining a title in fee simple, and also giving notice of the appointment of an arbitrator "to act in pursuance of the provisions of the Railway Clauses Consolidation Act." Endorsed on this was the certificate of Francis Kerr, a sworn surveyor of Upper Canada, that the piece of land in the annexed notice described is shewn on the map or plan of the Grand Trunk Railway Company deposited in the office of the clerk of the peace of the county of Waterloo, in which county the land is situate, and that the land is required for the railway; that he knows the land, and that the sum offered is in his opinion a fair compensation for the land, and for all damages-given in pursuance of the Railway Clauses Consolidation Act, dated June, 1854. It was admitted that the plaintiff appointed an arbitrator; that he and the arbitrator named by the company appointed a third arbitrator; and that, by award dated the 21st of December, 1854, £19 11s. 6d., was awarded to the plaintiff. This sum included the expenses of the award, which the arbitrators ordered should be borne by the plaintiff, inasmuch as the

amount awarded was less than the compensation tendered by the company, but the expenses were to be paid in the first instance by the company, and the amount was to be deducted from the sum of £19 11s. 6d., and the balance was to be paid to the plaintiff at the time of his executing a deed in fee of the land. Shortly after the date of the award, £16 1s. 6d., being the balance of the sum awarded, after deducting the expenses, was tendered to the plaintiff, who refused to accept it, and on the 17th of February afterwards it was paid into the Court of Common Pleas. The action was commenced on the 18th of December, 1854, just three days before the award was made. It was admitted that the award did not include any damages to crops caused by cattle, &c., gettting in where the fences were thrown down, which was in September, 1854, after the notice dad been served on the plaintiff. It was also admitted that the map, &c., was filed in the office of the clerk of the peace on the 30th of December, 1853.

Upon this evidence, the jury was directed to exclude from their consideration all damages excepting those to the crops, &c., which were not included in the award; and they found for the plaintiff, with £7 5s. 0d.

In Easter term, Irving, on behalf of the plaintiff, obtained a rule nisi to set aside the verdict, and for a new trial without costs, for misdirection, and on the law and evidence—citing The River Dun Navigation Company v. The North Midland Railway Company, 1 Railw. Cas. 135; Stone v. The Commercial Railway Company, Ib. 375; Jones v. The Great Western Railway Company, Ib. 684; Regina v. Bristol and Exeter Railway Company, 1 P. & D. 170, note; Ramsden v. The Manchester, &c., Railway Company, 1 Ex. 723; North Staffordshire Railway Company and Wood, 2 Ex. 244; Johnson v. Ontario, Simcoe, and Huron Railway Company, 11 U. C. R., 246.

Galt, contra, relied on the various clauses of the Railway Clauses Consolidation Act, and of the Act incorporating the Grand Trunk Railway Company.

solidation Act, sub-sec. 7, it is provided, that the notice to be served on the party shall contain a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands, describing them; a declaration of readiness to pay some certain sum or rent, as the case may be, as compensation for such lands or for such damages; and the name of a person to be appointed as the arbitrator of the company, if their offer be not accepted; and such notice shall be accompanied by the certificate of a sworn surveyor, disinterested in the matter, and not being the arbitrator named in the notice, that the land, if the notice relates to the taking of land, shewn on the map or plan, is required for the railway; that he knows the land or the amount of damage likely to arise from the exercise of the powers, and that the sum so offered is in his opinion a fair compensation for the land, and for the damages as aforesaid.

The first question arising is, whether a notice of the intention of the company to take the lands, in the form prescribed by the act, containing an offer to pay a named sums and all the other particulars, but saying nothing else of the intention to exercise any powers (other than of absolutely taking) in respect to lands, is to be held and treated as a notice under which the company have a right to proceed to arbitration, for the purpose of ascertaining as well as the price of the lands, as the consequential damage resulting to the other portion of the property, from the mere taking such lands.

The only power which the company in this instance intended to exercise or have exercised is that of acquiring a certain portion of the plaintiff's lands. They clearly possess the power, though a particular mode is pointed out of exercising it; and as regards the notice, it appears to me to follow the very language of the act. There is a distinction clearly enough suggested between compensation for lands taken and damages occasioned by the exercise of other powers; but I do not find anything which suggests that in a case like the present the company should give notice that they intend to take certain portions of land, and in taking them, to divide the plaintiff's farm; and that they should

express their readiness to pay a certain sum as compensation for the land, and a further sum for the damages so to be occasioned. The land cannot be taken in a case like the present without dividing the plaintiff's land, though there might be cases when it would not have that effect, or where it might occasion other damage, as by severing the plaintiff's remaining land from a highway. But where the very act of taking some land, as in this case, inevitable produces an effect on the residue of the land, notice of that intention, or notice of exercising the whole power, and tendering a sum as compensation for that land, appears to me to include within itself compensation for the direct consequences of the act done, and not to be limited to the mere value of the land per acre. It would, I think, be contrary to the policy of the act to treat the two as distinct. If the plaintiff, as the owner of the farm, were contracting voluntarily for the sale of the strip taken by the company, he would doubtless inhance the price of what he sold by his estimate of the injurious consequences of the sale on the residue. Here the legislature have, in fact, made the contract for him, that he shall sell, leaving the compensation to be ascertained as pointed out in the act; and the notice constitutes the relative situation of vendor and purchaser between him and the company.-Stone v. The Commercial R. W. Co. (1 Railw. Cas. 124); Doo v. The London and Croydon R. W. Co. (4 Myl. & Cr. 257). And I see no reason why this compensation should not be held to include that which would, if he were (strictly speaking) making the contract himself, form an element in ascertaining the price.

I am of opinion that the legislature intended such a notice as that given in the present case to be sufficient for referring to arbitration the whole question of compensation for land taken—i.e., price and damage directly caused to the residue of the land, a part of which is so taken, by the severance. I have not omitted to refer to English authorities on the subject; but in so doing it is necessary to bear in mind that those decisions are grounded on the English statutes, and can therefore only furnish rules for us where the statutory provisions are alike. But there is a very great difference be-

tween our act in reference to lands and their valuation, and the Land Clauses Consolidation Act in England. Many provisions contained in the latter are wholly omitted by our legislators, who seem to have striven to condense and simplify, and have omitted many clauses which in England have been thought necessary for the full protection of the parties interested in lands required for, or injuriously affected by, the railway.

It appears to me also indisputable, that both the value of the land taken, and the damage caused by the taking were intended by the legislature to be settled only in the mode pointed out by the act. It is quite true that the trespasses complained of in this case were committed—i. e., the entry on and taking possession of plaintiff's land, and commencing the construction of the railway, before the company had complied with any of the provisions of the 19th subsection of section By so doing they subjected themselves to an action of trespass, and this they now admit, together with their liability to all the damages resulting from that trespass, excepting the value of the land taken, and the value of the injurious affecting of the residue of the plaintiff's lot, by the taking the particular portion; and the sole question is, not whether they were trespassers, and so liable to some damages, but whether these particular damages are recoverable in this action. They are, in truth, damages for the future as well as the past; for the evidence given by the plaintiff was precisely of that character which would be requisite to establish what the plaintiff should receive in addition to the fact of so much land taken—the value of the injury or deterioration of the residue of his land, occasioned by the taking the track for the railway through it; damages, therefore, to which the plaintiff could only be entitled upon the supposition that he lost all title to the land taken and all claim as for a continuing injury or wrong; a consequence which, I apprehend, could not follow the merely wrongful act of these defendants, nor yet of the railway company, treating the wrongful act as theirsfor that would be the obtaining a title by them by wrong, and against, instead of by compliance with the provisions of the act. It is true, our statute enacts many provisions respecting

conveyance of lands required and taken for the purpose of the railway, though there is a provision that under certain circumstances the award shall itself constitute the title of the company, or the agreement, when there has been one, and no conveyance has been executed; but there is nothing which could warrant the inference that a recovery in an action like the present, though coupled with a continuing occupation by the company, would vest in them a title to the land so occupied, or would bar an ejectment brought by the owner. For these reasons, I think that in a case like the present-where a map designating the land to be taken has been duly filed, and a notice describing the land, tendering a compensation, and naming an arbitrator, has been served; where the plaintiff has actually appointed his arbitrator, and an award has been made though shortly after the writ was sued out-an action will not lie to recover either the value of the land taken, or those damages which arise, not from the mere act of trespass, but as a consequence of the plaintiff losing his right and title to that part of the land occupied for the railway track.

The award may or may not be open to objections. view I entertain would not be affected by that consideration. If the award be bad, the plaintiff would, I apprehend, clearly have an action for any continuing wrong and damage inflicted on his property by the company, and this would continue until the company became lawfully entitled to the tract of land over which the railway passed, or discontinued the injury. As to one objection, that one entire sum was awarded, blending the price of the land, and the damage together, I will merely point out that the English statute (8 Vic. ch. 18, sec. 49, expressly requires these damages to be severed in the finding of the jury, who enquire of and assess the same; and that, while the notice of intention to take lands under that statute proceeds from the company, the parties interested in the lands have also to give a notice, shewing, among other things, their claim, if any, for damages for severing or otherwise injuriously affecting the lands through which the railway track passes, neither of which provisions are to be found in our The absence of the latter provision, coupled with the distinction already pointed out, which appears in our act, between

compensation for lands taken and for damages occasioned by the exercise of other powers, has greatly influenced me in the conclusion I have arrived at respecting the sufficiency of this notice as authorizing an arbitration on both points.

In addition to the cases cited in the argument, I refer to Taylor v. Clemson (2 Q. B. 978), and the Marquis of Salisbury v. The Great Northern Railway Co. (17 Q. B. 840), in which two cases are collected a great number of authorities illustrative of the construction of the various English railway acts.

Burns, J.—There is no doubt the defendants have rendered themselves liable to an action at the plaintiff's suit, by reason that they cannot justify themselves under the proceedings of the Grand Trunk Railway Company, in consequence of the defendants having entered on the plaintiff's lands before the company was in a position to give their contractors the authority to do so. The question then to be disposed of is, what is the proper measure of damages for which the defendants have made themselves responsible. It appears to me there are two sufficient and substantial reasons why the defendants are not responsible for either the value of the land taken by the company for the track of the railway, or for damages by reason of the plaintiff's property being severed into separate portions.

1st. If the company is not in a position to acquire the fee simple of the land, then the plaintiff has not lost his title, but may bring his ejectment, and so obtain his land again; and that being so, in an action of this description—for cutting down trees, digging holes, making excavations, trenches, and embankments—the proper measure of damages would be, what injury all that did to the plaintiff? But suppose (notwithstanding the defendants have rendered themselves liable to an action) that the company is in a position to acquire the title to the land of the track of the railway, then the question is, what should be the measure of damages the plaintiff should recover? According to the case of the Marquis of Salisbury v. The Great Northern Railway Company (21 L. J. Q. B. 185), under the notice which the company gave to the

² q—VOL. XIII. Q. R.

plaintiff the relative position of vendor and purchaser was established; and so far as regards the value of the land the plaintiff could at once compel the company to complete the purchase, and he would be bound to adopt the remedy which the act of incorporation provides, and could take no other. If the defendants did no more than construct the works of the railway upon the tract of land which the company had a right to acquire under the notice, it is difficult to see, though the plaintiff may have a right of action against the defendants for the wrongful entry, what right he can have to recover damages for the embankments and trenches, which would be necessary for the railway. Should the defendants, however, have caused an injury to the plaintiff beyond that-such as, if by means of pulling down the fences the plaintiff had sustained other injuries—then for such I should say they are liable. If such injuries were, however, consequent upon the construction of the work, and the company had lawfully acquired the title to the track, then it would be, as we have already held in Rutledge v. the Woodstock and Lake Erie Railway and Harbour Company (12 U.C. R. 663,) a case for compensation to be obtained in the manner pointed out in the Railway Clauses Consolidation Act. In this case the defendants did not wait to place the plaintiff in a position to make such a claim against the company; and the company might very well say to any claim afterwards made upon them, that if it had been known that such a claim would have been made a different period of the year might have been chosen, and some time might have been selected to do their work when the plaintiff would have sustained less or no injury; and thus have caused the company to pay less by way of compensation. To the latter extent the defendants have rendered themselves liable; but I think it absurd to say that they also have made themselves liable for the value of the land, which must either belong to the plaintiff, by reason that the company has no title, or must so far belong to the company that the plaintiff has the means in his own hands of compelling the company to purchase it. This view renders it quite unnecessary to consider the validity and effect of the award between the plaintiff and the company.

2ndly. It seems to me equally clear the defendants are not liable for any damage the plaintiff may have sustained by reason of a permanent severance of his property into separate In the first place, I consider the notice which the company gave embraces any claim which the plaintiff might have in respect of that matter. The seventh sub-section of section 11 of the Railway Clauses Consolidation Act provides, that the notice shall contain a declaration of readiness to pay a sum as compensation for such lands, or for such damages. In order fully to understand that expression we must go back to the fifth sub-section, which provides for such damages being ascertained amicably if it can be done. Here it is said compensation may be agreed for in respect of lands which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway. This expression, I think, is wide enough to embrace a claim for damage by reason of a farm being separated into portions by the railway, and so constituting an injury to the owner. If the claim cannot be settled amicably according to the provisions of the fifth sub-section, then that section says all questions which shall arise between the parties shall be settled in the manner afterwards provided, and such compensation for such damages, spoken of in the seventh sub-section, relates to the same which the fifth sub-section provides for being amicably settled. But suppose there could be any doubt about this view being correct, then, secondly, I am of opinion the defendants are not liable, upon another principle. It is not the acts of the defendants as charged in the declaration which cause the permanent severance of the portions of the farm. The cutting down of the trees could not do it; and notwithstanding the turning up of the soil, and making trenches and embankments, and encumbering the close with great quantities of earth, the plaintiff's property, if he is entitled to recover it back, may all, for what we see stated in the declaration, or know upon the subject, be restored again to its natural state. What causes the permanent severance is the act of the company; namely, taking a tract of land and seizing it for the railway. That act is not the defendants' doing, nor is it a consequence of their acts. We may suppose the laying

down of the iron rails, and the company causing locomotives to traverse them, will follow the work done by the defendants; but to render the defendants liable, the result should be the consequence of their act. The consequence here results from the act of the company; namely, filing their plan or map, shewing that the land would be required for the railway, and giving notice to the parties to that effect, and then taking the land for that purpose.

Rule discharged (a).

WILKES V. GZOWSKI ET AL.

14 & 15 Vic. ch. 51, sec. 11—Notice withdrawn and not renewed—Trespass— Damages.

The Grand Trunk Railway Company gave a notice to the plaintiff under 14 & 15 Vic. ch. 51, sec. 11, sub-sec. 5, of their intention to take about eleven acres of his farm, through which their line passed. They afterwards withdrew this notice, and informed the plaintiff verbally that a new notice would be given, but omitted to give it. The quantity marked on the company's map, which was duly filed, was only 2.25 acres. The defendants, contractors under the company, having entered upon this portion and constructed their railway.

Held, that the plaintiff was entitled to recover damages for the loss of compation of such portion, and for the inconvenience occasioned to him in the use of his farm by its being thus intersected, up to the commence-

ment of this action.

TRESPASS, quare clausum fregit, being the west part of No. 6, north side of Snyder's road, in Wilmot, cutting down trees, digging holes and trenches, putting earth, logs, stones, stumps, rubbish, &c., upon the close, and continuing the same there, and thereby encumbering the close, and walking upon and over, and letting or driving cattle upon and over the close, and destroying grass, wheat, &c., and throwing down fences, whereby the said close is much deteriorated in value, and the plaintiff is prevented from enjoying the same as beneficially as he otherwise would. Plea—Not guilty, by statute.

The case was tried in May, 1855, at Berlin, before *Draper*, J. It was admitted that the line of the Grand Trunk Railway crossed the plaintiff's farm, and that the enbankments were put on the plaintiff's land as part of the grading and work of that railway, and that the defendants, as contractors

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

under the Grand Trunk Railway Company, committed the trespasses, throwing down fences, and thereby exposing the plaintiff's grass, &c., to be consumed and destroyed, and making all the embankments, and doing the other work necessary for constructing the line of railway. It was also proved that the Grank Trunk Railway Company at first intended to place and erect a station on the plaintiff's land, and for that purpose to take about eleven acres of his land, and gave him notice of that intention; but afterwards, Mr. Webster, who was agent for the railway company and for the contractors, gave him verbal notice that they would withdraw that notice, as they intended to take less; and the quantity marked out on the map filed by the company was only 2.25 acres, being what was required for the track. It was after the receipt of the letter from the plaintiff, dated the 18th of September 1851, that the first notice, which was to take 11 acres, was withdrawn; and the plaintiff was informed by the company's agent that he would change the notice. No new notice was however given. It was admitted that the map or plan, &c., required by the 10th section of the Railway Clauses Consolidation Act, was filed as pointed out in that section. The acts which were duly complained of as constituting the plaintiff's cause of action were two-fold: 1st-The throwing down plaintiff's fences, and making the railway track, or grading upon his land, including digging, depositing earth, &c., severing one portion of the farm from the other, &c.; all these acts being done within the land shewn upon the map, as containing 2.25 acres required for the track: Second, damages arising from throwing down the fences, thereby exposing plaintiff's crops to destruction, and consequent injury to them. The jury were told that the plaintiff had clearly a right to recover for the second portion of the claim, and also for any trespass committed dehors the line designated on the map; that is, beyond the limits of the 2.25 acres; and that, as to the other damages, they were matters to be arbitrated on, under the provisions of the act; though doubt was expressed on this point, owing to the conduct of the agent of the company in first giving a notice of intention to take a larger quantity of land than the statute authorized, then abandoning that notice.

and giving no other—See Railway Clauses Consolidation Act, sec. 10, 9thly; sec. 11, 6thly, 7thly, 9thly, 16thly, 19thly; and on the ground that the entry had been made on the plaintiff's lands, and the work executed, without the observance on the part of the company of the necessary preliminaries. The plaintiff's counsel excepted to the charge on this latter point, contending that the defendants were trespassers without the protection of the act, under the facts proved. The jury found for the plaintiffs, damages £15, stating it was on the second head of damage only; viz., injury to growing crops.

In Easter term, Irving obtained a rule nisi to set aside the verdict for misdirection.

Galt shewed cause.

DRAPER, J.—The tenth section of the Railway Clauses Consolidation Act-1st, requires the filing of the map, &c., which is admitted to have been done; without this the execution of the railway "shall not be proceeded with" (4thly.) The quantity of land which may be taken without the consent of the proprietor is limited (9thly), not to exceed thirty yards in breadth, except in such places where the railway shall be raised more than five feet higher, or cut more than five feet deeper, than the surface of the line, or where offsets shall be established; or where stations, depots, or fixtures are intended to be erected. or goods to be delivered, and then not more than two hundred yards in length, by one hundred and fifty yards in breadth, without the consent of the person authorized to convey such The eleventh section (5thly) enacts, that one month from the deposit of the map, &c., and from notice thereof in at least one newspaper, if there be any published in, &c., application may be made to the owners of, or to parties empowered to convey, or interested in, lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway; and thereupon agreements and contracts may be made with the said parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which compensation shall be ascertained, as shall seem expedient to both parties; and in case of disagreement all questions shall be settled as

follows. 6thly. The deposit of a map, &c., and the notice of such deposit, given as aforesaid (i. e., in one newspaper), shall be deemed a general notice to all such parties as aforesaid. 7thly. The notice served upon the party (this notice must mean the application to be made to owners, &c., provided for 5thly) must contain a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands, a declaration of readiness to pay some certain sum or rent, as compensation for such lands or damages, and the name of person to be appointed as the arbitrator of the company, if their offer be not accepted, and such notice is to be accompanied by the certificate of a sworn surveyor disinterested, and not the arbitrator named, that the land shewn on the map is required; that he knows the land, or the amount of damage likely to arise from the exercise of the powers; and that the sum offered is in his opinion a fair compensation. 16thly. Any such notice for lands may be desisted from, and new notice given with regard to the same or other lands, to the same or any other party; but in any such case the liability to the party first notified for all damages or costs by him incurred in consequence of such first notice and desistment, shall subsist. 19thly. Upon payment or legal tender of the compensation or annual rent so awarded or agreed upon, or upon the deposit of such compensation (in the office of certain courts), the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent shall have been awarded or agreed upon. Provision is made, in the event of resistance or forcible opposition being made to their so doing by any person, for the judge of the county court to issue a warrant to the sheriff or a bailiff to put the company into possession.

The company had power, for the purpose of surveying and examining, to acquire all necessary information to enable them to make out their maps, plans, and book of reference, To enter into the lands of any person without any previous license or permission. To this extent, and doing no unnecessary damage, they would be protected from being made

liable as trespassers. Where they require possession of the lands or to do any act which will do damage to the lands of any person, it is different. There are preliminaries to be observed, conditions precedent to be fulfilled, before such act or acts are legalized. Until they are performed, the company have no more right than any other mere stranger over the lands lying along the track of their intended railroad-See Ramsden v. The Manchester Railway Company (1 Exch. 723.) It cannot, I think, be said that they have a right to invoke the protection of the statute, as preventing a recovery for damages for such acts, except in the mode especially designated, when they have done those acts in total disregard of the directions contained in the act, and designed for information and protection of the proprietors of such lands. The notice to which every such party was entitled of the acts intended to be done under the authority of the act, coupled with the delay of the right of entry being complete, until the amount of compensation was ascertained and tendered, was, I think, meant, not simply to enable the party to take the necessary steps for getting compensation, but to give him a reasonable time to make such other arrangements in respect to the remaining portion of his property as running the railway through his land might render necessary or desirable. Even if not strictly speaking intended by the Legislature, the proprietor would derive this advantage from the preliminaries being observed by the railway company, and ought not to be deprived of it.

The difficulty that I felt at the trial was, that the plaintiff claimed to recover for the full amount of the diminution in value of his farm, owing to its being severed by the railway passing through it, and to the quantity of land (2.25 acres) being taken away from him. It was plain, under the circumstances, or at least it seemed plain to me then, that the plaintiff still continued to be lawful owner of these 2.25 acres; that the company had acquired no title or right in them by anything that had taken place; and that, before the plaintiff could be deprived of his right of ownership, certain steps on the part of the company must be taken in compliance with the statute; and that, for all that appeared, the company, and those acting under them, were trespassers from day to

day in entering on or holding possession of the plaintiff's land, in continuing their embankments, &c., on it: while, on the other hand. I thought the plaintiff was in fact claiming to ascertain, through the verdict of the jury, the compensation to which he was entitled for loss of land and other continuing damage occasioned by the defendants acting as if under authority of the statute, and as if the company had or would acquire such rights in and over the land taken as the statute would have given had its directions been obeyed; and I did not understand the claim to damages of this nature to be otherwise advanced. I thought this could not be right, and that the plaintiff could not, even though defendants were clearly trespassers, claim such damages in any other way than the statute pointed out. It did not occur to my own mind that, assuming my general view to be correct, the plaintiff had a right to damages for the loss of the occupation and enjoyment of the land actually embraced within the line designated on the map, and encumbered more or less by the defendants' works, or for the actual inconvenience and loss occasioned to him in the general use of his farm, owing to its being thus intersected, up to the time of action brought; and though my charge was strongly objected to because I excluded the larger view of the question from the consideration of the jury, I do not remember that I was required to submit the more limited view to them.

I think, however, that to this extent at least the plaintiff had a right to go to the jury, and therefore that the rule should be made absolute.

As to the effect of notice duly given to take lands, see Marquis of Salisbury v. Great Northern Railway Co. (17 Q. B. 840), and the numerous authorities therein cited.

Burns, J.—This case differs from that of Martini v. Gzowski in this respect, that though the notice was given to the plaintiff, yet it was withdrawn or abandoned, and no new notice was given. I apprehend he could not take any step to appoint an arbitrator, and thus obtain satisfaction for his land, or for damages consequent upon the construction of the road. His remedy could only be by ejectment to recover his 2r—Vol. XIII. Q.B.

land back, or by repeated actions of trespass, for the injury he sustained from time to time by being deprived of the use of it, and the consequent injury of using the different portions of his farm disadvantageously. Although the company may have acted illegally in this case, and the defendants may have subjected themselves to a greater claim for damages against them than they would have done had a new notice been given; yet that, in my opinion, does not enable the plaintiff to claim damages in this action to the extent of the value of the land itself, or for a permanent severance of it into portions. I see nothing to prevent him from recovering his land back, or he may bring repeated actions of trespass against the company or those acting under the company, for occupying, encumbering, or injuring him by using his property for the railway. In the action of trespass, the measure of damages is for the actual injury the trespass occasions up to the time of bringing the action, or time laid in the declaration, for which the plaintiff complains, and for any other matters of aggravation which the trespass has occasioned and the plaintiff is legally entitled to claim. My brother Draper considers that in this respect he took rather too limited a view of the plaintiff's claim, and I agree with him; and for this reason, although I feel clear that the plaintiff is not entitled in this action either to recover substantial damages for the land taken by the company, or damages as for a permanent severance of his lands, yet there should be a new trial in order that the case may properly be submitted to another jury, if the plaintiff is not content with the amount already assessed, which is for him to consider.

Rule absolute (a).

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

WARD V. THE GREAT WESTERN RAILWAY COMPANY.

FREEMAN v.	"6	"	66	"
BOYLE v.	"	. "	60	60
BROOKS V	66	"	"	66

Great Western Railway Co.—Obstruction of highway—Excavations—Pleading-Right of action.

The defendants' line crossed the highway between the plaintiff's farm and the town of London, and at the crossing a deep cutting was necessarily made. The plaintiff sued defendants, charging as the breach of duty that after a reasonable time for restoring the road had elapsed, they wrongfully and injuriously continued the said cutting, and thereby the highway had been rendered impassable, and the plaintiff had been prevented from driving along it to town, and carrying the produce of his farm, as he frequently required to do. The evidence shewed that it was impossible to construct a bridge across the cut until it was completed, and the banks shaped and dressed off. The plaintiff's over witness sweet that the defend shaped and dressed off. The plaintiff's own witness swore that the defend-

shaped and dressed off. The plaintiff's own witness swore that the defendants had carried on the work with diligence; and before the trial the bridge had been completed, and the use of the highway restored.

Held, that the plaintiff could not recover—1st. Because it was no wrong on the defendants' part to let the cutting and excavation continue for however long a time, and that was the injury complained of; 2dly. If the declaration had complained of delay in restoring the road by a bridge the evidence disproved such a charge; and, 3rdly. If such delay had been proved, then the defendants would have been guilty of obstructing a public highway, for which they might be indicted, but the plaintiff as an individual could maintain no action.

The plaintiff sued in case (writ issued 8th of November, 1854), and declared that on the 1st of June, 1853, he was, and is possessed of certain land in the first concession of the township of London (describing it), and stating it to be adjacent to the town of London; that there was a common highway over and along the first concession of London, leading to and from the town of London, for the plaintiff and all other subjects of the Queen to go and pass at their free will and pleasure; that the said highway was at the time when, &c., the only highway or public road leading from plaintiff's land to the town of London, which is a market town; that in the construction of defendants' railway it became necessary for them to cross the said highway at a point between the plaintiff's land and the town of London; and that defendants, on the 1st of January, in pursuance of the powers given to them for that purpose by law, necessarily made large and deep cuttings across the said highway in order to make their railway, whereupon it became their duty within a reasonable time thereafter to restore the said highway to its former state, or to such a state as not to impair its usefulness; and the

declaration charged that defendants, in breach of their duty, after a reasonable time for restoring the road had elapsedto wit, on the 1st of June, 1858-wrongfully and injuriously continued the said large cuttings and excavations in and across the said highway from the said 1st of January to the bringing of this suit, being an unreasonable and unnecessary length of time, and thereby during all that time the said highway had been rendered and had continued impassable, and utterly useless to the plaintiff; and that the defendants had thereby so obstructed the said road or highway, that they had prevented the plaintiff from driving his horses, waggons, &c., upon and along the said highway from the said tenements of the plaintiff to the town of London and back, as he frequently required to do; and by reason thereof the plaintiff had not been able to carry the produce of his said land to London, nor had been able to enjoy the said highway, as he of right ought and otherwise would have done, but had during all the time been deprived of all the advantages of the said common or public road or highway, and had thereby suffered great loss: to the plaintiff's damage of £150.

The defendants pleaded—1. Not guilty "by statute;"
2. That there was not nor is any such public road or highway as the plaintiff had alleged, &c.

At the trial at London, before McLean, J., it was proved on the part of the plaintiff, that in the township of London, some two or three miles from the town, the Great Western Railway crossed the road in question, which was shewn to be a common public highway; that the cutting at the point of intersection was very deep, not less than sixty feet deep, the opening at the top of the cut being about 200 feet wide; that while the work was in progress the inhabitants in that vicinity used a road which had been opened, but very imperfectly, along the side of the railway, on the top of the deep cutting, and which led along to the lower level at the commencement of the deep cutting where the railway could be conveniently crossed; but this road was circuitous and very rough, so that it was impossible to carry such loads as had been usually carried by the plaintiff and others along the road which had been interrupted by the railroad, and that at some seasons it was nearly or quite impassable.

The cutting was commenced in June, and not completed till November. It was impossible to construct a bridge across the cut and over the highway in question, until the cutting had been completed, and the banks shaped and dressed off as they were intended to stand; and it was sworn by the plaintiff's own witness that the defendants prosecuted this work to completion with diligence.

This action was brought in November, and was tried in the spring following; and in March, before the trial, the bridge was completed, which restored the original highway.

The plaintiff's land did not come down to the highway, but laid about half a mile from it, and it was proved that he had been in the frequent habit, before the highway was interrupted, of passing with his teams along the highway to and from London, with his flour, grain, &c., and with lime, which he had been accustomed to drive to London for sale.

It will be observed that the declaration does not complain of any delay or neglect on the part of the defendants in building the bridge or restoring the road, but merely that they had allowed the cutting and excavation across the highway to continue for an unreasonable time; and at the trial it was not objected that there had been any culpable delay in restoring the use of the highway or bridge across the railway cut, and the plaintiff did not desire to have any question of that kind submitted to the jury.

The defendants contended that they were on several grounds entitled to a verdict; that they had a legal right to take their railway across the road, as the declaration in fact admitted; and if they were bound in a reasonable time to restore the passage by a bridge, they had in fact done so without unreasonable delay; also, that if in constructing their railway they had done any damage to the plaintiff, none of whose land had been taken by them, his only remedy to obtain a recompense was by arbitration, as the statute points out; and it was further objected that, at any rate, if any wrong had been done by the defendants in illegally obstructing a common public highway, such as the declaration described this to be, it would be a public injury, for which the defendants might be liable to be indicted, but the plaintiff could not make his share of the inconvenience the ground of a separate action.

The learned judge agreed in that view of the case, and directed the jury to find for the defendants, which they did accordingly.

Three other actions had been brought at the suit of Freeman, Boyle, and Brooks, respectively, against the defendants, for an alleged injury of precisely the same description, occasioned by the same cutting across this highway.

The pleadings in all the cases were perfectly similar, the statement of damage being the same in all, and in none of them more special than is above stated. The only difference in any of the cases was that Freeman's action was not brought till the 17th of March, 1855; all the others were commenced on the 8th of November, 1854.

No evidence was gone into in any of the cases except Ward's, which was first tried, and it was agreed that the same testimony should be considered as given in each case; and that it should be left to the court to determine whether, upon such evidence, the jury were properly directed to find for the defendants.

It was admitted that none of the plaintiffs had land coming up to the highway, but that they lived in the neighbourhood, at greater or less distances, having frequent occasion, like the other inhabitants of that part of the township, to travel along this highway in going to and returning from London, and probably requiring to use the road more or less frequently according to their comparative proximity to the town.

Connor, Q. C., Cooper with him, obtained a rule nisi in each case, for a new trial on the law and evidence, and for misdirection. They cited Regina v. Scott, 3 Q. B. 543; Wilkes v. Hungerford Market Company, 2 Bing. N. C. 281; Dobson v. Blackmore, 9 Q. B. 991; Rose v. Groves, 6 Scott N. R. 645.

Becher, contra, cited Parnell v. Great Western R. W. Co., 4 C. P. 517; McDonald v. The Ontario, Simcoe, & Huron R. R. Co., 11 U. C. R. 271; Regina v. North Midland R. W. Co., 2 Railw. Cas. 1; Shelford on Railways, 459, 461.

Robinson, C. J., delivered the judgment of the court. We think the verdict given for the defendants is clearly right upon the evidence, for these reasons, independently of

any others, that it was no wrong on the part of the defendants to let the "cutting and excavation continue" for however long a time, and this is the only injury complained of. The cutting and excavation continue now that the bridge has been built, and would and must have continued if the bridge could have been built immediately. That is not illegal, for it is necessary for the railway, and the law allows it. If there was culpable neglect in not restoring the road by building a bridge, that should have been charged as the wrong, but nothing is said of that in the declaration. The plaintiff, as it seems to us, if he could maintain an individual action at all for such an injury, might have treated the cut as having been wrongfully and illegally made, and might have relied upon the failure in restoring the road as in effect destroying the authority to make and keep the cut open. He has, however, admitted the cutting to have been necessary, and has not complained of it, and he does not complain of not restoring the road. the next place, if the plaintiff had complained of that on which alone he could rest his action-namely, neglect to restore the road by bridging across the cut-it is obvious that that could not have been done, nor even commenced, until the cutting was completed, and the sloping on each side shaped as it was intended to be left. There was no evidence that there was unreasonable delay, or any delay, in proceeding with the railway; on the contrary, the plaintiff's witness swore that there was not.

The jury then could surely never come to the conclusion that after the cutting was done there was delay in not having a bridge of that magnitude completed, when the bridge was in fact finished and ready for use.

If, however, the defendants had been shewn to have been guilty of delaying to restore the road for an unreasonable time, or if there had been any ground for leaving a question upon that point to the jury, and if the plaintiff had urged to have such a question referred to them, the enquiry would then in effect have been whether the defendants had illegally obstructed a common publichighway, for according to the plaintiff's own statement of his case this was a common highway.

It has been determined in England, under similar circum-

stances, and we have adopted the same view here, that where authority is given to a railway company to cross a highway, provided that they restore the means of passing in a reasonable time, either by a bridge or otherwise, as the case may require—if the company exercise the power, and neglect to observe the condition on which it was given to them, they may be treated as having been wrong-doers, in interrupting the highway; in which case they would be liable to indictment—Regina v. Scott et al. (3 Q. B. 543; S. C., 2 G. & D. 729; 3 Railw. Cas. 187).

It follows that no individual could bring an action for his share of the inconvenience, except where there is some clear ground for distinguishing his case from that of Her Majesty's subjects in general; some special damage which has not been suffered by others. Now, that there is nothing peculiar in the case of any one of these plaintiffs, is evident from the fact that the very same form of declaration is used as equally applicable to all. The declarations are in all respects alike: no peculiar special damage is laid, nor any proved. For all that appears, there may have been many others having occasion to use the road more frequently than, or quite as frequently as, the plaintiff; and if the plaintiff were allowed to recover upon this declaration and evidence, we do not see on what principle we could say that there may not be some hundreds or thousands of others having the same right to a separate civil action. It never can depend on the comparative number of times which one person or another might probably have had occasion to use the road, for we could draw no line that would shew when the right of action on that ground should be recognized as existing.

Rules discharged.

MARKLE V. THOMAS, SHERIFF, &C.

Sheriff—Liability far delay in selling—Inconsistent verdict—Authority to sheriff to buy in for plaintiff—How far binding.

Where, in an action against a sheriff for delay in selling lands, the jury rendered a verdict for the defendant, saying that there had been unnecessary delay, but the plaintiff bad not been prejudiced by it, the court refused to interfere.

The plaintiff, before the sale, gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land. Held, that the plaintiff had clearly no ground of action against him for so doing; and quære, whether the writing could be construed as more than an authority, and whether, if the defendant had disregarded it altogether, any action could have been maintained.

CASE. The first count alleged that on the 16th of April, 1851, the plaintiff recovered a judgment against one Henry Beasley, of £674 14s. 1d., and on that day sued out a Fi. Fa. against goods, directed to the sheriff of Wentworth, returnable on the first day of Easter term then next, endorsed to levy £658 11s. 8d., with interest from the 16th of June, 1850, and £16 2s. 5d. for costs, with interest, besides sheriff's fees, and £1 2s. 6d. for the writ. The count alleged that this writ was delivered to the defendant to be executed, and that whilst it was in the defendant's hands there were divers goods and chattels of Beasley, of the value of £200, within the defendant's county, of which the defendant could, and might, and ought to have levied a portion—to wit £200—of the moneys endorsed on the writ, and of which the defendant had notice. It alleged further, that though the time for the return of the writ had long expired, and the defendant could and ought to have returned it when the same was returnable, yet the defendant did not and would not, within a reasonable time, or at any time, levy or cause to be made of the said goods and chattels the moneys aforesaid, but wholly omitted and neglected so to do; and further, that he wrongfully and injuriously omitted, neglected and refused to return the said writ at the return thereof, and after a reasonable time; but the defendant afterwards, on the 7th of June, 1851, wrongfully, falsely, and deceitfully returned that Beasley had no goods or chattels in his county whereof he could cause the damages or any part thereof to be made; by means whereof the plaintiff was and is greatly injured, and hindered and delayed in the recovery of a portion of his damages. The count then alleged that on

the 2nd of June, 1851, the plaintiff sued out a Fi. Fa. against lands, returnable on the last day of Easter term, 1852, indorsed as the other writ; and this writ was placed in the defendant's hands to be executed: that there were lands and tenements of Beasley within the county, of which the defendant could, and might, and ought to have levied the moneys, and a reasonable time for so doing elapsed before the commencement of the suit, and the defendant had notice; and although the time for the return of the writ had elapsed; and before this action the defendant might have made the money, and ought to have returned the writ on the return day, and though the defendant at all times had notice, yet he did not and would not, within a reasonable time, or at any time, levy the moneys for the lands and tenements, but neglected and omitted so to do; and the defendant wrongfully and injuriously neglected and omitted to return the last-mentioned writ at the return day: and after the expiration of a reasonable time—to wit, on the 7th of June, 1852—wrongfully falsely, and deceitfully returned that Beasley had not any lands or tenements in his county, whereof he could cause to be levied the same damages, or any part thereof; whereby the plaintiff had been and is greatly injured, and hindered and delayed in the recovery of the said damages; and he hath been forced and obliged to pay and incur divers liabilities, charges, and expenses, to the value of £10, in causing further proceedings to be instituted for the recovery of his damages. count further alleged that on the 7th of June, 1852, the plaintiff sued out an alias Fi. Fa. against lands, returnable on the first day of Trinity term then next, endorsed and delivered as the others. It then alleged that, though there were lands and tenements of the said Beasley within the county, and though the defendant under the writ seized and took the same in execution, and could have levied the moneys so endorsed, and a reasonable time for so doing had elapsed before the return of such writ, of which the defendant had notice, yet the defendant did not nor would levy the moneys, but wrong fully neglected and refused so to do, and during the time preceding the return of the last writ wrongfully neglected the execution thereof; and afterwards, on the 1st of September, 1853,

wrongfully, falsely, and deceitfully returned upon the lastmentioned writ that the lands which he had seized remained on hand for want of buyers; whereby the plaintiff hath been and is greatly injured, and hindered and delayed in the recovery of his damages, and has been obliged to incur and hath incurred divers liabilities, charges, and expenses, amounting to £10, in causing further proceedings to be instituted for the recovery of his damages. The count then further alleged that on the 13th of September, 1853, the plaintiff sued out a Ven. Ex., which was indorsed and delivered as the other writs; that though the defendant might have sold the land upon this writ before the return, and within a reasonable time, yet the defendant did not and would not levy the moneys, but wrongfully and injuriously neglected and refused so to do, and, wrongfully intending to injure the plaintiff, did not and would not have the money, or any part thereof, ready for the plaintiff, according to the exigency of the writ, but wrongfully and injuriously neglected; and afterwards, and not until the lapse of an unreasonable time, on the 10th of February, 1855, wrongfully and injuriously, falsely and deceitfully, returned that by virtue of the writ to him directed he had made and levied the moneys mentioned, and that the same were paid to the plaintiff, by reason of his being the purchaser of such lands and tenements at the public sale made by the defendant under the writ; and the plaintiff averred that the defendant did not effect and had not effected such sale of Beasley's lands, and that the defendant did not make and had not made of such lands the said moneys, or any part thereof, nor were the same or any part thereof paid over to the plaintiff; and that the plaintiff was not and is not the purchaser of such lands, -of all which the defendant had knowledge and notice; whereby the plaintiff has been and is greatly injured, delayed, hindered, and prevented from receiving any benefit or advantage from his judgment, and is likely to lose his damages, and has incurred great expenses.

The second count, after alleging the recovery of judgment, as in the first, and the issuing of the Ven. Ex., then averred that at the defendant's request he was retained by the plaintiff to attend for and on behalf of the plaintiff whenever and wherever the lands of Beasley should be offered for sale under

the Ven. Ex.; and if, upon such offering for sale, the same should be in danger of being purchased for an amount less than the damages and costs adjudged to the plaintiff, to offer, for and on behalf of the plaintiff, to become the purchaser at a sufficiently increased price beyond such amount for which the lands should be in danger of being purchased, but not exceeding the amount of the damages and costs, as should be sufficient to constitute the plaintiff the purchaser thereof instead of the person seeking to become purchaser, and to effect the purchaser for the plaintiff upon such terms; that on the 15th of September, 1853, the defendant offered the lands for sale under the writ, and was present, and acting on behalf of the plaintiff under the retainer; and upon such offering for sale the same was in danger of being purchased by one John Start for £25, and thereupon it became and was the duty of the defendant to have offered, for and on behalf of the plaintiff, to become the purchaser thereof at such sufficiently increased price beyond the sum for which it was in danger of being purchased as then was reasonably necessary to effect the purpose for which the defendant was retained, but not to offer so to purchase, and not to effect the purchase, at or for a larger price than was reasonably necessary to effect such purpose; yet the defendant, disregarding his duty in that behalf, and intending to injure the plaintiff, fraudulently, negligently, carelessly, wrongfully, and injuriously, offered to, and did then effect the purchase of the said lands on behalf of the plaintiff, at and for an unreasonably larger price beyond that for which the same was then in danger of being so purchased by Start, and at a price exceeding the amount of the damages and costs so recovered by the plaintiff; to wit, at and for the price and sum of £810 6s. 7d.; whereby the plaintiff hath been and is greatly injured, and forced to pay for the lands on unnecessarily, excessively, and improperly large price—to wit, £794 6s. 7d.—beyond and exceeding the price and sum for which the defendant might, and could, and ought to have purchased the same for the plaintiff; and the plaintiff has hereby been forced and obliged to purchase and pay for such lands at and for a larger price and sum than he was willing and authorized the defendant to pay therefor;

and the plaintiff hath thereby greatly lost and been deprived of the benefit and advantage of his judgment, and hath been unnecessarily and improperly forced, and obliged, and rendered liable to pay and to expend divers large sums of money, amounting to £200, for sheriff's poundage, and for costs, and charges, and expenses, of and concerning the sale.

Pleas-1. Not guilty, to the whole declaration: 2. To so much of the first count as relates to the writ of Fi. Fa. against goods, that Beasley had no goods of which the defendant had notice: 3. To so much-of the first count as charges defendant with neglecting to return the Fi. Fa. against goods in time, that defendant did return the same in time, according to the exigency thereof: 4. To so much of the first count as relates to the Fi. Fa. against goods, that the plaintiff accepted the return of nulla bona with full notice and knowledge that the same was untrue, and that upon such return the plaintiff issued a Fi. Fa. against lands, and that the return to the Fi. Fa. against goods had always been treated, accepted, and acted upon by the plaintiff, as a true return; and founded upon the same the plaintiff sued out the Fi. Fa. against lands, which had not been abandoned, or countermanded, or waived by the plaintiff, or set aside or vacated in any way, but had been treated by the plaintiff as valid and effectual and operative, and ought to conclude the plaintiff from denying the truth of the return to the Fi. Fa. against goods: 5. To so much of the first count as relates to the first Fi. Fa. against lands, that Beasley had no lands whereof the defendant had notice: 6. To so much of the first count as relates to the first writ of Fi. Fa. against lands, that the plaintiff ought not to sue, because the plaintiff accepted from the defendant the return of no lands with full knowledge that the same was untrue, and upon such return sued out the alias Fi. Fa. against lands, and accepted the same return, and acted thereon, and ought not to be admitted now to say the defendant falsely returned that there were no lands: 7. To so much of the first count as relates to the alias Fi. Fa. against lands, that the plaintiff accepted the return of lands on hand as a true return, and thereupon sued out a Ven. Ex., and the plaintiff ought not to be admitted to say the return to the

al. Fi. Fa. is false: 8. To so much of the first count as relates to the Ven. Ex., that the plaintiff ought not to be admitted to say the return to that writ is false, because defendant says he did offer and expose the lands for sale, and the plaintiff, by his agent, became the purchaser of the lands seized for the sum indorsed on the Fi. Fa., and the same was accordingly sold to him: 9. To so much of the first count as charges that the plaintiff was not the purchaser, that the plaintiff was not retained by the plaintiff as alleged.

The replication joined issue upon the 1st, 2nd, 3rd, 5th, 9th, and 10th pleas; and to the 4th, 6th, and 7th pleas the plaintiff said, that true it is the writs in said pleas respectively mentioned were returned as stated, and though true it is that the plaintiff issued the writs as stated, and that they were in force as stated, yet the defendant of his own wrong, and without the residue of the causes, committed the grievances alleged. To the 8th plea the plaintiff denied that he became the purchaser of the lands.

Rejoinder.—The defendant demurred to so much of the replication as replied de injuriâ absque residuo causæ to the 4th and 6th pleas, and joined issue on the remainder.

At the trial, before Burns, J., at the last assizes held at Hamilton, the facts proved were these :- Mr. John Miller, of Galt, was the plaintiff's attorney in the suit of the plaintiff v. Beasley, and he proved that he did not complain of the return of the writ of Fi. Fa. against goods, or of defendant's conduct thereupon; but he did complain of the return of no lands upon the first writ against lands, and of what the defendant had done upon the subsequent writs. the various writs stated in the pleadings were proved. was proved that Beasley lived in a house upon a lot of land in Hamilton on the 16th of April, 1851, and from thence down to the time of trial, and that he had no other known lands, if he owned that upon which he lived. It was stated that every one in Hamilton knew that he lived in this house, he having built it, and that he had the land from his father, as was generally supposed. The alias Fi. Fa. was supposed by all concerned, the sheriff and the plaintiff's attorney, and others, to have been returnable after the expiration of a year, and not the following term, as it in truth was; and this discovery was not made by those acting on the sheriff's part until the trial, and the plaintiff's attorney in the first action did not seem to be aware that it was returnable so soon. The defendant had advertised the lands upon the alias Fi. Fa. to take place on the 1st of September, 1853. Other sheriff's sales were to take place on the same day. On that day the plaintiff and his son, and some others, attended the sale. Other sales took place that day, but the sale of Beasley's land did not take place, and why it did not was not proved. The plaintiff and the defendant had some conversation together, at which no one was present; and after the conversation the defendant announced that the sale was not then to be proceeded with, but was adjourned for a fortnight. No objection was made to this step; and the plaintiff signed a paper in these words, which he delivered to the defendant: " Hamilton, -

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"Mr. Sheriff,—I authorize you to bid at public sale on my account to the amount of my debt, costs, &c., in this suit.

(Signed) "ISAAC MARKLE."

The defendant advertised the adjourned sale to take place on the 15th of September, 1853, and then returned the alias Fi. Fa.; and on the 13th of September, 1853, the Ven. Ex. issued, and was placed in defendant's hands. On the 2nd September, 1853, the defendant wrote to Mr. Miller, advising him that the sale would take place on the 15th of September. Mr. Miller stated that he did not reply to this letter, because he was not on good terms with the defendant, but he wrote to Mr. Freeman of Hamilton, who was his agent. in business generally, to attend at the sale on behalf of the plaintiff. The defendant receiving no reply to his letter of the 2nd of September, again on the 14th of September advised Mr. Miller that the sale was to be on the 15th, and Mr. Miller then sent a telegraphic message to Mr. Freeman, which he did not receive till the afternoon of the 15th. Mr. Miller had seen his client (the plaintiff), who informed him

that he had given the defendant the authority before mentioned, in answer to which Mr. Miller advised him that he had done wrong. Mr. Freeman having forgotten Mr. Miller's letter asking him to attend the sale, was not present on the 15th. On that day the sale took place in the sheriff's office at the court-house, at the time, place, and manner sheriff's sales are usually conducted. There were several persons present, but neither plaintiff nor any one on his behalf attended. Mr. Start bid £25 for the lands, and the defendant stated to the persons present that he was authorized to bid to the amount of the debt and costs, and read to them the paper before mentioned. On Mr. Start bidding the £25 the defendant waited a little, expecting Mr. Freeman, for Mr. Freeman had previously stated to him that he intended to be present on the plaintiff's behalf. The defendant had also told Mr. Freeman of the authority he held from the plaintiff in case the plaintiff or some one did not attend on his behalf. After delaying some little time on Mr. Start's bid, the sheriff bid to the amount of the debt and costs, and no one going beyond that the sale was closed. It appeared there was a difficulty about the title, but of what nature was not proved or stated. Notwithstanding that, however, Mr. Start said he considered the property worth £1000 in cash, and he was prepared to have bid nearly up to the amount of the debt, but not to go beyond that sum. When he found that the sheriff was instructed to bid to the extent of the debt and costs, he declined to go beyond that sum, and the sale at once closed at that amount. The defendant was ready at once to return the writ of Ven. Ex., and execute a sheriff 's conveyance to the plaintiff. A discussion afterwards arose between Mr. Miller, through Mr Freeman as his agent, whether the defendant should have bid to the amount of the whole debt and costs, he (Mr., Miller) and the plaintiff thinking, if the defendant had bid gradually over Mr. Start, that he (Mr. Start) would have stopped long before it reached that amount, and the plaintiff would consequently have got the property so much less. The return of the writ was delayed in consequence. The plaintiff finally declined to receive any conveyance, and brought the present action.

The defendant called no witnesses, the jury saying they were prepared to find for the defendant on the main questions. The learned judge submitted to the jury to say whether there was a delay in executing the alias Fi. Fa. from June, 1853, to the 15th of September, 1853. He told the jury that in his opinion, whether the writ was legal or not in being returnable in less than twelve months from being issued, yet that the sheriff could not sell under twelve months. This view was objected to (a). He stated that all ground of complaint respecting the Fi. Fa. against goods was removed after Mr. Miller's testimony; and as to the first Fi. Fa. against lands, it was not shewn that the defendant was notified of there being lands; and that it was the duty of the plaintiff to search and discover lands, and notify the sheriff of them, and that the plaintiff had not established any ground to recover damages on that branch of the case. Upon the second count he told the jury that in his opinion the defendant, upon the authority he had from the plaintiff, might at once bid to the extent of the debt and costs, and that the plaintiff had no ground of complaint against the defendant for not bidding gradually above the others.

The charge was objected to, and it was contended that it should have been left to the jury to say whether the sheriff knew that Beasley was living upon the lands, claiming the same as his own, and that it was the duty of the sheriff to bid gradually over the other bidders, and not at once to bid the amount of the debt and costs.

The jury found for the defendant, stating that in point of fact there was a delay, for that the sheriff might have sold sooner; but at the same time they found for defendant, because they said the plaintiff had sustained no damage or injury by it.

Martin, last term, obtained a rule nisi for a new trial on the law and evidence, and for misdirection. VanKoughnet Q. C., shewed cause, and cited Olding v. Smith, 16 Jur. 497.

Connor, Q. C., and Martin, supported the rule, citing—Clifton v. Hooper, 6 Q. B. 468; Mason v. Paynter, 1 Q. B.

⁽a) See Nickall v. Crawford, Tay. Rep. 376, which was not referred to at the trial.

² t-vol. XIII. Q. B.

974; Cook v. Palmer, 6 B. & C. 742; Woods v. Finnis, 7 Ex. 363; Raleigh v. Atkinson, 6 M. & W. 670.

Robinson, C. J., delivered the judgment of the court.

We think that the jury took a just and reasonable view of this case, and one not inconsistent with the law or the facts. If we were to grant a new trial, we should only be enabling the plaintiff to keep up a vexatious litigation, when he really appears to have nothing substantial to complain of.

As to what the defendant as sheriff did or omitted to do under the Fi. Fa. against goods, after hearing the evidence of Mr. Miller, the plaintiff's attorney, it became unnecessary to think more of that branch of the case; and we are at a loss to understand how it could have been thought reasonable to found any complaint upon it, since it is fully admitted by the plaintiff's own attorney, that he was aware the debtor had no goods, and that he looked to the land which he occupied (whatever might be his title to it) as affording the only means of making anything under the writ.

Then, as to the complaint of delay in selling the lands, the jury said that there had been some delay, but that the plaintiff had sustained no damage; and therefore they found for the defendant. It has been contended that there is such an inconsistency in that finding that the verdict must inevitably be set aside; but the law is not so unreasonable, for if that were laid down as an inflexible principle, the sheriff would be bound in every case to act with the greatest possible rigour. Whether the debtor really had any lands or notthat is, whether he had any legal estate in the property on which he was living-does not appear. Of course, unless he had, there could be no legal damage. As the sheriff did put up the property, and this plaintiff, being the plaintiff in the execution, was content to bid it off, we may assume that the debtor had some interest in the estate, perhaps an absolute Whatever it was it was sold, and whatever interest the debtor had is now the plaintiff's, if he choose to retain it; and it is sworn by the witnesses that its value is much more than the value of the plaintiff's debt.

Seeing the evidence that was given of what passed on the day when Beasley's interest in this property was advertised

to be sold, but was not in fact sold, because the sale was postponed with the apparent acquiescence of the plaintiff, who was present, and was seen to converse in private with the sheriff just before the adjournment of the sale for a fortnight was announced, it is not surprising that the jury should conclude that the sale would have gone on at that time if the plaintiff had been pressing; and they might naturally infer from that that his setting up afterwards a cause of action against the sheriff, on the ground of delay in not selling before, was an after-thought, and not altogether fair towards the sheriff.

The end of the whole transaction, however, seems to be, that if Beasley really owned the land the plaintiff has his debt fully paid, with interest and costs; that he got the land on the very terms he contemplated, as appears by his own written authority given to the sheriff, and that he is a large gainer in getting it at that price.

If he is not satisfied with his title, and would prefer rejecting the property, and if it is true, as he asserts, that the sheriff acted unfaithfully by him in exceeding his authority given to bid for him, then he would not be bound to abide by the bid; but he has given no evidence that he has made up his mind to reject the property. If he had done so, on the ground that Beasley owned no legal estate, then he would be admitting by that that he could have suffered no injury from the alleged delay in selling under the writ against lands.

As to the delay in selling, it appears to have arisen chiefly from the circumstance that the plaintiff's attorney and the sheriff were in a common error, as to the time when the alias Fi. Fa. against lands was returnable, and that they both imagined that on the alias, as well as on the first writ against lands, it was requisite that there should be the lapse of a year between the issuing of the writ and the sale.

With respect to the special count against the sheriff for an alleged failure to perform properly a duty of agency, which he is supposed to have assumed on behalf of the plaintiff, by reason of which the plaintiff has been made to pay more for the land than he need have done, it seems founded on a strange and inadmissible construction of the effect of the

memorandum given by the plaintiff to the sheriff, by which he authorized the sheriff to bid for him at the sale, to the amount of the sum leviable under the writ. That was merely an authority to the sheriff, which warranted him in considering the plaintiff willing to become a bidder to that amount. If he had forgotten or disregarded that memorandum, and had allowed the estate to be bid off by a stranger at a sum less than the amount of the execution, and if the plaintiff had sued the sheriff in consequence, as for the breach of a duty assumed by him, then it would have become a question whether it would be right to consider that authority given by the plaintiff as having the effect of throwing upon the sheriff a responsibility, in the character of a private agent to the plaintiff, and that too in a matter in which he was bound to act as a public officer indifferently between the parties. The complaint, however, is, not that the sheriff did nothing, or too little, but that he did too much. think the jury could fairly say that. Even admitting that the sheriff stood in the position of an ordinary agent, acting for the creditor only, he did precisely what the plaintiff's written memorandum empowered him to do. The witness examined at the trial, who bid £25 for the property, stated that he would have gone on bidding, and probably to the amount of the execution, but that when the sheriff read publicly the plaintiff's authority to him to bid to the amount of the debt and costs, he determined to bid no longer, because he was not willing to go beyond that.

I think this is the first case in which the plaintiff, by giving such a memorandum to the sheriff, imagined that he was doing more than conveying an authority. And it no doubt had weight with the jury that in this case the sheriff wrote to the plaintiff's attorney, telling him on what day the sale would be, and suggesting to him that he should attend, which letter the plaintiff's attorney admits he took no notice of, because, as he said, he was not on good terms with the sheriff. That seems in some measure to account for an action being brought, when there seems but little if any ground for it, and of which the jury, as it appears to us, have not unreasonably disposed.

HEDLEY V. CLOSTER ET AL.

Replevin-14 & 15 Vic. ch. 64-Staying proceedings.

C. mortgaged to the plaintiff the goods in his shop to secure payment of £125. The plaintiff having entered into possession of all C.'s stock in the shop, the greater portion of which was not there at the execution of the mortgage, C. replevied. This action on the replevin bond had been taken down to the county court, and the trial postponed.—The court, on application, ordered proceedings to be stayed on payment of the amount secured by the mortgage, with interest and costs.

Freeman for defendant, obtained a rule nisi to shew cause why all further proceedings in this action should not be stayed, on payment of the amount mentioned in the condition of a bill of sale or chattel mortgage, a copy of which was attached to the defendant's affidavit; or the amount due thereon, and the costs of the defendant in the replevin suit, in which the bond on which this action is brought is given, and the costs of this suit and application; or upon such other terms as the court might direct. He cited 11 Geo. II. ch. 19, sec, 23; Hunt v. Round, 2 Dowl. 558; Gingell v. Turnbull, 3 Bing. N. C. 881; Hefford v. Alger, 1 Taunt. 218.

It appeared that on the 20th of July, 1853, Closter, one of the defendants, gave a chattel mortgage to the plaintiff Hedley, to secure payment of £125, which Hedley had lent to the defendant Kelly, to be repaid, as the mortgage expressed, on the 20th of October following. The mortgage was upon all the goods then in Closter's store, of which a very loose description was given, and also any goods that might be brought into the store during the continuance of the security. It was registered under the statute.

After giving this mortgage, Closter brought other goods into the store, which he had bought from another of these defendants, Carpenter, and from other parties. There was at that time also a contract between the plaintiff and defendant Closter about a saw mill which Closter was to take from the plaintiff, in which he was to saw lumber for him on certain terms. Closter swore that under this contract Hedley became indebted to him by the time the mortgage fell due in as much or more than would cover it, as he believed; that nevertheless, on the 20th of October, 1853, Hedley took possession of his whole stock of goods under the mortgage, at which time there were not over £200 worth which had

been in the store when the mortgage was made; but there were other goods to a large amount, which he purchased after the assignment. The other two defendants, being creditors of his for goods afterwards bought and in the shop, became sureties at his request in the replevin bond, on which this action was brought, and he, Closter, replevied the goods. On the trial of the replevin, Closter failed in proving the true state of accounts between him and Hedley, and he swore that there was now pending in the Court of Chancery a suit in which an account of all the transactions between him and Hedley respecting the saw-mill was to be taken; that the defendant McInnes, in this suit, was not a party to the suit in Chancery, and could not be affected by it, and that he, Closter, was insolvent.

Carpenter made affidavit confirming some parts of this statement, and he stated his own readiness to pay Hedley the £125 and interest, though Closter had always insisted that he did not owe it.

It was sworn on the part of the plaintiff that at the last sittings of the County Court for Wentworth, the trial of this action on the replevin bond, which had been sent down by writ of trial, was put off, on the application of Closter, till the next sittings of the County Court, on payment of costs; or, if the plaintiff should prefer it, to the next assizes for Wentworth, on the ground of the absence of a material witness, and to enable him to examine the plaintiff Hedley, who resided in Buffalo.

Crooks shewed cause, and relied on Ruttan v. Short, 12 U. C. R. 485.

ROBINSON, C. J., delivered the judgment of the court.

We do not see that the circumstance last mentioned should be held to disable the defendant from making this application. It has been assumed by us that, in replevin under our late act, proceedings in actions brought upon the replevin bonds taken may be stayed by the court upon just terms, the same as in replevin after distress. And we can see no reason why this action should not be stayed on paying the amount secured by the mortgage, with interests and costs, as moved. The plaintiff can have no claim upon the goods beyond the amount of his debt recited in the mortgage, any more than in replevin upon a distress for rent the landlord can have a claim beyond his rent.

The sureties may be supposed to have executed the bond with a knowledge of the amount which the plaintiff was claiming or could have claimed, and which he was endeavouring to enforce by seizing the goods. If they could not safely look to this as limiting their liability, great inconvenience might follow, for then a man having but a small claim might seize goods of a hundred times the value, and the owner might be unable to find sureties for replevying. Here there was a great stretch of right by the plaintiff in seizing goods which could not be affected by his mortgage. I mean those goods which did not belong to the mortgage when he made the assignment, for a prospective mortgage of this kind cannot operate upon goods afterwards acquired—Gale v. Burnell (7 Q. B. 850).

Rule absolute, for staying proceedings on the terms moved the money to be paid within a fortnight, with leave to move a judge to enlarge the time on application.

SWAN V. CLELLAND.

Slander—Words spoken at election—Excessive damages—Death of plaintiff before return of rule nisi for new trial.

The words charged were spoken with reference to plaintiff's qualification at an election, a matter in which defendant had an interest, and on which it is of consequence to encourage freedom of discussion. The evidence was doubtful as to the sense in which they were used, and the damages large—The court, under these circumstances, granted a new trial on payment of costs.

The plaintiff having died before the return of the rule nisi, it was made a condition, that in the event of a second verdict for the plaintiff, judgment should be entered as if such verdict had been rendered at the time of the first trial; and that defendant should undertake not to assign error.

SLANDER.—The declaration charged the defendant maliciously said of the plaintiff, in his presence, and in the presence of divers others, &c., "You are a perjured man." Special damage was laid—that by reason of the defendant speaking these words, the plaintiff was deprived of the opportunity of standing for, and being elected to the office of township councillor; the returning officer, by reason thereof, being induced to object, and having objected to the plaintiff as a fit and proper person to stand for the said office.

Plea, not guilty. Verdict for plaintiff £150.

Cosens obtained a rule nisi for a new taial on the law and evidence, and on account of the rejection of legal evidence and for misdirection, and on the ground that the damages were excessive.

After this rule nisi was obtained at the instance of the defendant, and before it was returnable—viz., on the 6th of July last—the plaintiff died. M. C. Cameron shewed cause, and objected that under such circumstances a new trial could not be ordered. He cited, as to the question of damages, Eakins v. Evans, 3 O. S. 383; Orpwood v. Barkes, 4 Bing. 261. Cosens, contra, cited—Griffith v. Williams, 1 Cr. & J. 47; Dubois v. Keats, 9 L. J. (Q. B.) 66; Creed v. Fisher, 18 Jur. 228; Price v. Severn, 7 Bing. 316; Dewey v. Bayntun, 6 East 256.

ROBINSON, C. J., delivered the judgment of the court.

Mention was made in the argument of a case in this court, of Barney v. Hitchings, Hilary Term, 1853,) but that was different in its circumstances. There the defendant obtained a verdict at the trial, as he had done on a former trial. The plaintiff, who resided in the United States, was expected by his counsel to be present at the second trial, but he did not attend; and great stress was laid on his absence by the counsel for the defendant in his address to the jury, as if the plaintiff was afraid to confront the witnesses who would be called to repel his case. But it turned out afterwards that he was in fact dead before the day of taial, though he was alive on the commission day of the assizes. Notwithstanding his death, the gentleman who had been his counsel moved in the following term for a new trial, without shewing that he was instructed by the personal representatives of the deceased plaintiff to make such an application.

We felt a difficulty in entertaining the motion, and referred to a case of Freeman v. Rosher (13 Q. B. 780,) and desired at least to see that the executors or administrators of

Barney had authorized the motion. If I recollect rightly, no such authority was afterwards produced, though we afforded time for it, and we heard no more of the case.

In this case the plaintiff was living when the defendant, who failed at the trial, obtained his rule upon him to shew cause why the verdict should not be set aside. His death after the trial, and before final judgment could be entered, would not abate the suit. The statute 17 Car. II. ch. 8, prevents that effect following, even in actions strictly personal, as this is.—Palmer v. Cohen (2 B. & Ad. 966.) The defendant will therefore undoubtedly remain liable to have the verdict enforced, notwithstanding the plaintiff's death, if he obtains no relief upon the application which he made in the plaintiff's life-time. The first question then is, if we should think him clearly liable to relief—as, for instance, if the verdict was clearly against law, or there was an evident misdirection at the trial, is there any insuperable difficulty in the way of setting aside the verdict? It appears not.

Griffith v. Williams (1 Cr. & J. 47,) and the case of Anderdon v. Lord Foley (2 Law J. N. S. Q. B. 214,) seem to shew that very clearly; and indeed the most cruel injustice might in some cases happen to a defendant, if a verdict manifestly against law or evidence must of necessity be conclusive upon him, merely because the plaintiff has died since it was rendered. The courts have in such cases, however, imposed such terms in granting a new trial as would guard against inconvenience arising in consequence of the death of the opposite party. We have had difficulty in understanding how the court in any such case can do more than simply set aside the verdict, for as to a new trial, there seems no proper means of going on with that in the absence of any plaintiff. or of any one legally authorized to act for the plaintiff; but if we were to set aside the verdict, and do no more, that might in some cases do great injustice to the deceased plaintiff's estate; but the case I have referred to certainly supports us in granting a new trial, though we might, in the absence of such authority, have hesitated. We have therefore to consider what grounds there are in this case, if any, for calling for our interposition. We have carefully con-

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sidered the evidence, and have referred to the learned Chief Justice, who tried the case. It appears to us very doubtful whether the defendant, if he certainly spoke the words charged before the election or return of the other candidate, should not be looked upon as speaking on an occasion which would afford privilege for what he said, provided he spoke with sincerity, and under the belief that what he said was He had an interest in the election, and an interest which usually leads people to exercise their privilege so fully and freely, that there is little disposition in general to go to law on account of anything said in contesting the legal qualification of either candidate or voter. But here the evidence taken altogether leads strongly to the conclusion that whatever was said about perjury, was said, not before the return of Rowat, the opposing candidate, but after he had been returned; and if so, it could have no influence upon the conduct of the returning officer in returning Rowat, and could not have occasioned the special damage which the plaintiff sets forth in his declaration, and which there seems much reason to suppose must have been made the ground for the large damages given by the jury. Then again, the weight of evidence is certainly in favour of what the defendant contended was the fact-namely, that he did not at any time speak the words in the bare unqualified sense in which they have been taken, but spoke to this effect-that if the plaintiff would swear to his qualification, and it should turn out that he had none, which the defendant gave the bystanders to understand was his impression, he would subject himself to be prosecuted, or brought up, as he expressed it, for perjury. Surely he had a right to say that. It would be a rude and unhandsome speech to make of a man whose qualification was free from any reasonable suspicion, but such words would not be actionable.

These considerations press with more force upon us than they otherwise would, from the damages being so high. Freedom of election is of consequence to be preserved, and no man should be fastidious about having his qualification questioned. If we could say that the evidence satisfactorily proved that the defendant, in speaking of a past occurrence,

said to the plaintiff, "you are a perjured man," and said nothing to qualify that, and to prevent its being understood as an absolute assertion, then undoubtedly the plaintiff's case would have been a clear one, and it is not likely we should have felt warranted in interfering on account of the largeness of the damages. But we think no one who reads the evidence can do otherwise than apprehend that the jury could hardly have looked upon this as a true statement of what occurred, and that they were unduly influenced by a feeling that the defendant had shewn throughout an unusual and unbecoming eagerness to prevent the plaintiff being returned, and had resorted to unfair means of preventing it. That may be very true; but still it was necessary for them to remember that this was an action of slander they were trying, which must be disposed of upon legal principles applicable to such actions, and that it was not sufficient for them to disapprove of the spirit shewn by the defendant. They were bound also to consider what were the exact words which he did utter; whether they supported the declaration and were spoken in the unqualified manner described in the declaration, or spoken otherwise—that is, hypothetically—and in the course of a discussion upon an occasion which fairly allowed of such discussions, where there was no intended abuse of a necessary privilege. We have had some difficulty in making up our minds in this case, but we have a strong feeling that the ends of justice will be promoted by granting a new trial upon proper terms, considering the circumstances of the plaintiff's death; and we make absolute the rule for setting aside the verdict and granting a new trial, upon the condition that the defendant pays costs, and that he consents, in case of a verdict being again rendered for the plaintiff, that judgment may be entered as if that verdict had been rendered at the assizes when the case was first tried, and that he will undertake not to assign error.

Rule absolute.

REGINA EX REL. SWAN V. ROWAT.

Costested election—Costs.

Held, that under 16 Vic. ch. 181, sec. 27, the judge deciding a contested election has a discretion to withhold costs altogether from either side, if he should think fit. Draper, J., dissenting.

This was a quo warranto case, tried before Mr. Justice Richards, to determine the right of defendant to hold his seat as a township councillor, to which he had been returned as duly elected. The learned judge determined that the defendant was entitled to retain his seat, but conceiving that he had a discretion to withhold costs, and that there were circumstances in the case which made it proper to do so, he gave judgment in favour of the defendant, but did not give him his costs against the relator.

Helliwell, for the defendant, obtained a rule nisi, in Easter term, to amend the order of Mr. Justice Richards, by giving to the defendant his costs of defence. He contended that the relator having failed, must be ordered to pay costs, and that there was no discretion to adjudge otherwise.

On the return of the rule this term, *Eccles* shewed cause, and affidavits were filed, showing that the relator died on the 6th July last; that is, after this rule *nisi* had issued, and before its return.

Cosens supported the rule, citing 16 Vic. ch. 181, sec. 27, Doe dem Hay v. Hunt, 12 U. C. R. 626; 2 Saund. 101, t. v.

ROBINSON, C. J.—It appears that most of the judges in cases before them in Chambers have acted upon the provision respecting costs in the statute as if it were discretionary to the full extent of withholding costs from the successful party. This being so, we shall not reverse this order, under the circumstances of the relator, against whom we are desired to give costs, being no longer living. Upon reference to the judges of both courts, we find that a majority of them place the same construction upon the clause in question as was placed by *Mr. Justice Richards*.

DRAPER, J.—The first statute on the subject (12 Vic. ch. 81, sec. 146) provided, with reference to the adjudication of these elections, that the cases should be decided on a writ of summons in the nature of a quo warranto, by the judge of the Court of Queen's Bench, upon statement and answer, and without formal pleadings, "and that the judge shall have power to hear and determine the validity of such election, and to award costs against the relator or defendant upon such writ, as he shall deem just."

This was amended by 13 & 14 Vic. ch. 64, Sched. A., No. 23, which, with regard to costs, contains the following provision: "And it shall and may be lawful for such judge, and he is hereby required, in the disposing of every such case, to award costs for or against the relator or defendant upon such writ, or for or against the returning officer, when he shall be so made a party to such proceedings as aforesaid, as to such judge shall seem just." There is a proviso, "that no costs shall be awarded against any person against whom any such writ of summons in the nature of a quo warranto shall be brought, who shall, within one week after being served with such writ," disclaim the offer in the mode pointed out, "unless it shall have been proved to the satisfaction of such court or judge that such person had been a consenting party to being put in nomination as candidate for such election, in which latter case such costs shall be in the discretion of such court or judge;" and there is a further proviso enabling an intervention and defence to be made, notwithstanding such disclaimer, either by the municipal corporation, or a municipal voter, in every which case such intervening party shall be liable and entitled to costs as any other party to such proceeding.

The 153rd section of 12 Vic. ch. 81 gives authority to the Court of Queen's Bench by rules to settle forms of writs, &c., to regulate the practice respecting the suing out and execution of such writs, the punishment of those guilty of contempt in disobeying the same, and generally for the regulation of the practice, as well at Chambers as in Banc, in hearing and determining the validity of such electiona, and the allowance of costs thereupon. The power is extended by 13 & 14

Vic. ch. 65, to the judges of the two Superior Courts of Common Law at Toronto, or the majority of them.

The 16 Vic. ch. 181, sec. 1, repeals the 146th sec. of 12 Vic. ch. 81, and its amendments as made by 13 & 14 Vic. ch. This act was passed on the 14th of June, 1853, and came into force on the 1st of July, 1853. Section 27 of this latter act authorizes the issue of the writ of summons in the nature of a quo warranto out of either of the superior courts of common law at Toronto, on an order of such court in term time, or on the fiat of a judge of either of such courts, or of the judge of the county court having jurisdiction over the municipality within which such election has taken place, in vacation. The relator must enter into a recognizance with two sureties, conditioned to prosecute the writ with effect, or to pay to the opposite party all such costs as shall be adjudged to him against such relator. The writ may be returnable before any judge of the superior courts, or before the judge of such county court. The judge is to "proceed in a summary manner, upon statement and answer, without formal pleadings, to hear and determine, &c. * * and it shall and may be lawful for such judge, and he is hereby required, in disposing of every such case, to award costs for or against the relator or defendant upon such writ, or for or against the returning officer, when he shall be so made a party to such proceedings as aforesaid, as to such judge shall seem just,thus following the words of 13 & 14 Vic. ch. 64. There is a precisely similar proviso as to disclaimer, placing, under the same circumstances, the power of giving or withholding costs in the discretion of the judge; and a similar proviso as to parties being allowed to intervene in case of disclaimer.

I have not been able to satisfy my own mind that a judge who is "required, in disposing of every such case, to award costs for or against the relator or defendant, or for or against the returning officer when he is made a party," obeys that requisition, and fulfils the intention of the Legislature although the words "as to such judge shall seem just" complete the sentence containing the requisition, by either omitting in his disposal of the case to say anything about costs, or by adjudging that he will not give costs to or against any of the parties before him on the writ.

Confining attention for the moment to this last act, and being called upon to construe it so as if possible to give effect to every word of the enactment, I think the words "as to such judge shall seem just," taken in connection with what goes before, might be held to give the judge a discretion, not to withhold costs altogether, but to award them to or against some, and not all, of the parties brought before him; as if the relator, the defendant, and the returning officer were before the judge, and the relator failed, the award of costs against the relator might be either the costs of the defendant, or of the returning officer, or of both; or if the relator succeeded, it might be awarded that he should recover costs from the defendant, or the returning officer, or from both; thus the direction to award costs would be obeyed, and the discretion in regard to them would be exercised. Against this construction, however, it might well be answered that the words "as he shall deem just" are to be found at the end of the 146th section of 12 Vic. ch. 81, in reference to the judge's power to award costs, and that in that statute no provision is contained for making the returning officer a party to the proceeding, or for disclaimer and intervention by other parties having an interest. Admitting the full force of this consideration, it must also be remembered, that in this act it is provided that the judge "shall have power, and he is hereby required to proceed in a summary manner, &c. &c., and to award costs against the relator or defendant upon such writ as he shall deem just;" while the latter act, as well as that of 13 & 14 Vic., enact that the judge "is hereby required to proceed in a summary manner," &c.; and in the latter part "that it shall and may be lawful for such judge, and he is hereby required in disposing of every case to award costs, &c. as to such judge shall seem just." The repetition of the phrase "and he is hereby required" may be deemed intentional, and designed to remove any doubt which the use of the words "shall deem just" might give rise to; while on the other hand some discretion must be presumed to be conferred on the judge by this phrase, and it may be strongly urged that, whatever that discretion may be, it must be the same under the first and the last act.

But it does not appear to me that the only construction of which the first act is susceptible is, that of giving the judge a discretion whether costs shall or shall not follow the decision. The 153rd section of the same act has given extensive power to the court, to be exercised by rules made in term time, regarding the practice to be followed in determining the validity of such municipal elections, and the allowance of costs thereon; and until such rules were made the quantum of costs to be given for the necessary proceedings in the trial of such elections would be unsettled, and could not be settled, unless the legislature gave an intermediate power to the judge before whom any case was brought; and the power to award costs against the relator or defendant, as the judge shall deem just, might be considered as a power to fix what amount of costs should be awarded until the court settled it by rule. The statute may be read thus, "which judge shall have power, upon proof by affidavit of such personal or other service, and he is hereby required, to proceed in a summary manner upon statement and answer, and without formal pleadings, to hear and determine the validity of such election, and to award costs against the relator or defendant upon such writ, as (i. e., in such manner as) he shall deem just." The judge is required to determine the validity of the election, and to award costs to one party or to the other, in such manner as he shall deem just. Whatever power the judge has in reference to costs, whether it be as to giving or withholding them, or as to the amount only, it is clearly in either case subordinate to the authority of the court, as given in the 153rd section; and in this particular, the words used being "the allowance of costs" it might be contended much more clearly that they give authority to withhold them, than the phrase used in the last statute can be said to do, for by it the judge is "required, in disposing of every such a case, to award costs for or against, &c., as to such judge shall deem just"-shewing, I think, that he is as much required to award costs as he is to determine the validity of the election.

Considering that the discretion given by the words "as to such judge shall seem just," is subordinate, and may be put

an end to by any rules the court may make as to the "allowance of costs, "I feel less hesitation in giving a more limited construction to the words importing discretion in the judge, than that of holding that they give power to withhold costs altogether. In my opinion the legislature, by the section of the latter act, which is to be substituted for that contained in the former, have still more clearly indicated an intention that costs should be awarded, if indeed they do not mean that they should follow the event. I prefer this construction to one which leaves the question open to the judgment of only one of so numerous a body as the judges of the Superior and County Courts—a judgment which, if resting on discretion only, could not, I apprehend, be made the ground of an appeal, nor could it be guided by any rule which the superior courts might frame, for no general rule could be adopted to guide the discretion of each judge exercised on the different circumstances of different cases; and indeed, if the granting or withholding costs is within the discretion of the particular judge, the power of the court as to making rules for the allowance of costs, would be limited to a power to fix their amount if allowed.

It appears to me further, that wherever the words of an enactment are fairly open to two constructions—the one laying down an absolute rule, the other leaving the matter discretionary—the safer construction is, to assume that the legislature intended to make the law, rather than to leave it to be made by judicial decision.

When first called upon to act under the statute 12 Vic., I adopted (as I believe the majority of the judges did) the conclusion that the power of giving or withholding costs was left to the judge who decided on the validity of the election. Further consideration has induced me to doubt the soundness of that opinion, even under that statute, and the latter enactments have brought me to the conclusion I have expressed.

I think, therefore, this rule should be made absolute so far as respects the allowance of costs. I see no ground for making any other change in the decision of the learned judge.

Burns, J., concurred in opinion with the Chief Justice.

Rule discharged—Draper, J., dissenting.

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IN RE SCOTT AND THE MUNICIPAL COUNCIL OF THE CITY OF OTTAWA.

An assessment for school purposes cannot be levied by an unequal rate in different wards in a city.

Helliwell obtained a rule nisi in this term to quash bylaw 124, passed by the Municipal Council of the City of Ottawa, on the 27th of August last, on the grounds that the school trustees of the said city had no authority to demand from the Municipal Council a distinct sum for each ward of the city for school purposes; and that the Municipal Council had no right to levy a different rate for each ward for such purposes.

The by-law was entitled "A by-law to impose certain rates for school purposes, during the current year, within the City of Ottawa.

It recited that the school trustees for the City of Ottawa had demanded from the Municipal Council the following sums of money, to be levied from the several wards respectively, for school purposes during the current year, viz.: from Ottawa ward, £340; from By ward, £335; from St. George's ward, £186; from Victoria ward, £136 10s.; and from Wellington ward £154. And it enacted that in order to provide the several sums so demanded there be imposed, levied, &c., in addition to all other rates, during the current year, the following rates on all taxable property in each of the wards, viz.: in Ottawa ward a rate of 1s. $2\frac{1}{8}$ d. in the pound; in By ward a rate of $8\frac{7}{8}$ d. in the pound; in St. George's ward a rate of 5d.; in Victoria ward a rate of $6\frac{1}{8}$ d; and in Wellington ward a rate of $3\frac{5}{8}$ d. in the pound.

Eccles, contra.

ROBINSON, C. J., delivered the judgment of the court.

We do not find anything to warrant this by-law. It is certainly at variance with the leading principle of the assessment laws, which requires that all rates shall be imposed equally upon the ratepayers of its municipality in proportion to their ratable property; and the school laws do not seem to sanction a departure from that principle in respect to rates to be imposed for school purposes. The intention of this by-law may have been just and reasonable, but no authority has been pointed out for such a mode of rating.

Rule absolute.

IN RE BRYANT AND THE MUNICIPALITY OF PITTSBURG.

By-Laws creating loans—Publication—Alteration before passing—12 Vic.

ch. 81, sec. 177.

The Municipality of Kingston proposed to take £7500 in a road company, and published a by-law (No. 6) to authorize a loan for that sum, containing the usual recitals, imposing a rate, and directing the issue of debentures, &c. When the by-law came on for discussion, a clause was added reducing the sum to £5000, and directing the rate to be altered accordingly, but the other provisions to remain the same: and it passed thus amended in June. 1854.

provisions to remain the same; and it passed thus amended in June, 1854. In December following, another by-law was passed (No. 8) providing for the issuing of debentures authorized by No. 6, and directing a rate to be levied for the payment of the interest thereon, but making distinct provisions for meeting the principal out of the profits of the stock to be taken, and from other funds. This by-law did not repeal No. 6, but the enactments in it shewed clearly that the rates imposed by that by-law were meant to be dispensed with.

Held, that this last by-law was bad, for it must be considered as a new and independent by-law, and not as a mere supplement to No. 6; and it shoud therefore have been published before passing, and have contained the usual recitals and enactments required in by-laws for creating a loan.

By-law No. 6, was also bad, though not moved against, for it was not published beforehand in the form in which it ultimately passed.

In Easter term last, Mr. Hagarty obtained a rule on the Municipality of Pittsburg, to shew cause why by-law No. 8 of that municipality, pass on the 16th of December, 1854, should not be quashed, with costs.

1st. Because the money to be raised under it is for the purpose of paying off a debt occasioned by the purchase of a work out of the limits of the municipality; viz., the Cataraqui Bridge.

2nd. Because this by-law does not express that the special rate per annum to be levied under it is to be levied above and in addition to all other rates.

3rd. Because it contains no clause appointing some day within the financial year in which the by-law was passed, when the same shall take effect.

4th. Because it never was duly published as required by statute 14 & 15 Vic. ch. 109, sec. 16, or the section in schedule of that act substituted for 12 Vic. ch. 181, sec. 155.

5th. Because it was not duly published as finally passed and amended, which the law requires.

6th. Because it provides that the money assessed for turn-piked roads in 1854 shall be applied to a sinking fund until the sum of £5,000 shall be paid off, which is a misappropriation of money assessed under a previous by-law.

On the 27th of June, 1854, the Municipality of Pittsburg passed a by-law (No. 6) to provide for taking and subscribing for stock in the Kingston, Pittsburg, and Gananoque Road Company.

This by-law recited that it was desirable for the Municipality of Pittsburg to contract a loan for enabling them to take stock to the amount of £7,500 in the stock of the Kingston, Pittsburg, and Gananoque Road Company, and in connection therewith to acquire the Cataragui bridge for the purpose of enabling the company to make the said road, for the construction whereof it was formed; whereby the interests of the said municipality and surrounding country would be greatly benefited, and the inhabitants thereof, as well as of the City of Kingston, and others, would be provided with greater facility for bringing their produce to market; and that in order to liquidate the debt or loan so to be created it was necessary that a special rate, above and in addition to all other rates, should be levied annually on the whole ratable property of Pittsburg; which sum to be annually raised will amount to, in 1854, £1,200, and in 1855, to £1,150, and so on, diminishing gradually to 1863, when the sum would be £795.

It further recited that the whole ratable property of Pittsburg, according to the returns for 1853, amounted to £84,000; and that the following annual rates in the pound upon ratable property would be required for paying the loan and interest, and for creating a sinking fund for paying the principal. viz.: for 1854, $3\frac{3}{7}d$. in the pound; for 1855, $3\frac{3}{10}d$., do.; for 1856, $\frac{6}{3}d$., do.; and so on, diminishing the rate to $2\frac{1}{7}d$. for 1863.

It then enacted that the Municipality of Pittsburg should subscribe stock in the Kingston, Pittsburg, and Gananoque Road Company to the amount of £7,500; that debentures should be duly signed for sums not less than £25 each, at 6 per cent. interest, payable half yearly, to the amount of £7,500, redeemable $_{10}^{-1}$ th on the 5th of January in each year, (1855 to 1864 inclusive), with interest payable on the 5th of January and 5th of July in each year; that for the payment of the said loan and interest, in the time limited, a special

rate be levied in each year on said amount of ratable property in the township, amounting, &c., (following the recitals in the preamble); that the following annual rate in the pound, for the respective years following, should, in the said years, be assessed and levied out of the said whole real and personal ratable property in the township; namely, for 1854, (enacting the rates stated in the preamble); that the said by-law should come into effect on the day after the day of meeting of the Municipal Council of the said township which should be held with reference to the passing of this by-law under the Municipal Corporation Amendment Act of 1851, ch. 109, sec. 16; that the Municipal Council might dispose of the stock to be subscribed as they might think fit, and should apply the dividends and proceeds thereof according to law, and for the advantage of the municipality; that all the enactments of the Parliament of Canada then in force, as far as they are applicable to this by-law, should be held to apply to it, and be incorporated therewith. A copy of a proposed by-law enacting only the above provisions, was published on the 25th of March, 1854, with the ordinary notice, signed by the clerk of the council, that it was a true copy of a proposed by-law to be taken into consideration by the Municipality of Pittsburg on the 27th of June, 1854, at which time the members of the municipality were required to attend; but when it was discussed on the 27th of June, 1854, a clause was added, as the eighth and last clause, "that instead of £7,500, the reeve shall take stock to the amount of £5,000 in the said joint stock road company, and that the rates for the payment of the interest and the redemption of the debentures to be issued shall be raised and levied to cover £5,000 only, the provisions of the by-law remaining the same as a guarantee to the holders of the said debentures;" and the by-law No. 6 passed on the 27th of June, 1854, in that amended form.

The by-law No. 8, now moved against, was passed on the 16th of December, 1854. It was entitled a by-law providing for the issuing of debentures and payment of the interest thereon, authorized by by-law No. 6, passed on the 27th of June, 1854, but not repealing the said by-law for taking

£5,000 stock in the Kingston, Pittsburg, and Gananoque Road Company, and for creating a sinking fund from the profits of the said road, to relieve in part the full amount of taxes provided in the before-mentioned by-law, and to assist in retiring said debentures.

And it provided that whereas £5,000 had been subscribed for 1,000 shares in the Kingston, Pittsburg, and Gananoque Road Co., in connection with the purchase of the Cataraqui bridge, to prevent any loss to the township in the sale of the debentures, the reeve and treasurer were thereby authorized and required to prepare and issue, on the application of the president of the Road Company, township debentures to the amount of £5,000, bearing interest at 6 per cent. per annum, payable half-yearly, to be redeemable at the end of ten years in manner therein mentioned; and such debentures were directed to be prepared and issued in such sums as the company might require.

2nd. That for paying the interest on the debentures an assessed rate should be levied and collected of one penny in the pound per annum, upon all ratable property in the said township; and if such rate should exceed the sum required to pay the interest, the surplus thereof should be carried to the sinking fund, with the profits of the stock, until the debentures should have been taken up and paid.

3rd. That for redeeming the debentures, the money assessed for turnpike roads in 1854, with the profits of the stock from year to year, should form a sinking fund, to be invested in some chartered bank, or other safe securities, at compound interest, until such sinking fund should accumulate to £5,000, and the debentures be fully paid off.

4th. That the treasurer should carefully invest the annual profits of the said road, as might be approved of by the council (with directions as to the interest), until the sinking fund should have accumulated to enough to pay off the debentures at maturity; and that, as the profits of the said road and bridge, after the work aforesaid shall be finished, were expected to amount to 8 per cent., or £400 a year, should the sinking fund not produce sufficient to pay off the debentures in

ten years, the balance required to complete that sum should be made up from the assessment of 1863, provided for in the by-law No. 6.

5th. That the Municipal Council should direct their treasurer to open an account with the township sinking fund, and to carry the sums therein provided to that fund, which account should be examined by the township councillors as therein directed; and a resolution was to be passed for investing at interest the money belonging to the sinking fund, and the dividends on the shares in the said Road Company; and no part of such sinking fund was to be withdrawn for any purpose till the debentures had, by its operation, been fully paid off; and when these should have been so paid off with the money of the sinking fund, that all credit in the treasurer's books was to be closed, and the surplus, if any, was to be carried to the township fund, and used for township purposes.

The by-law concluded by saying that, by the operation of its provisions, at the end of ten years the whole proceeds of the stock in the road would become an annual income to the township, sufficient to defray the present annual expenditure of the municipality, without laying any assessed rates on the inhahitants.

Bryant, who moved to have the by-law No. 8 quashed, swore that before June, 1854, he was, and that he still is, a resident freeholder of Pittsburg, and a ratepayer.

He set out the by-law No. 6, of which he also annexed a copy,—

And he stated that the by-law No. 8 was read a first time on the 25th of November, 1854, and the second and third times on the 16th of December following; that it was not published in any public newspaper; that in consequence of its being passed the members of the Municipal Council who passed it were all rejected at the last municipal election, and others chosen; that the Cataraqui bridge, referred to in the two by-laws, was not within the limits of the township of Pittsburg.

VanKoughnet, Q. C., shewed cause. The Solicitor General supported the rule. Robinson, C. J., delivered the judgment of the court.

The joint stock road company in which the stock has been taken is one formed under the general statute relating to such companies, for the purpose, as the registered instrument expresses it, of constructing a macadamized road from the limits of the City of Kingston, east of the Cataraqui bridge, to the village of Gananoque, and thence to the eastern limits of the township of Leeds, in the county of Leeds; and also other small branch roads specified in the articles of association, which roads are all within the township of Pittsburg. The capital stock of the company is declared to be £18,000, to be held in £5 shares, and the reeve of Pittsburg subscribed 1,000 of the shares.

The act of last session authorizing corporations of cities and towns to take stock in, or otherwise aid public works out of the limits of such cities or towns, and legalizing what may have been done before the act, in that way, by the municipal bodies of cities or towns, cannot be applied to this case of a township municipality.

It seemed not to be contended in the argument that the Cataraqui bridge is within the limits of the township of Pittsburg. The legislature, in their act 8 Geo. IV. ch. 12, sec. 3, appear to assume that it is not; and it is not contended that any part of it is within the township of Pittsburg.

But the municipality cannot be said to have purchased this bridge. They have only taken stock yearly to the amount of £5,000 in a road company, which is employed in making important improvements in the township of Pittsburg.

It seems to have been a strong motive with them for taking the stock, that it would enable the company to acquire the bridge; but we are not prepared to say that that would make their subscription of stock an illegal act.

There are, however, objections to the by-law No. 8, which we think we cannot avoid holding to be fatal to its validity. The by-law No. 6, in the first place, was clearly not so passed as the statute requires, for it never was published before passing. A copy of a proposed by-law for the purpose of authorizing stock to be taken was published, but not a copy of such a by-law as was afterwards passed; and this is what

the statute requires (14 & 15 ch. 109, sec. 16), for it says expressly that the copy to be laid before the ratepayers is to be a "copy of the by-law at length, as the same shall be ultimately passed."

And this is reasonable, if the reference to the ratepayers is to be of any use. It is true that the alteration made in this case, by the addition of the eighth clause, went to diminish the amount of stock to be taken, but it was not the less necessary on that account that the direction of the statute should be complied with. It may be very possible that some persons might approve of the by-law as it was originally framed, who would not approve of it with that alteration. But the by-law No. 6 was not moved against as illegal, and remains inforce, though it is not easy to see in what state it would have left the measure, if nothing had been afterwards done.

But we agree with the Solicitor-General's argument, that No. 8 is substantially a new and independent by-law, so far, at least, as to require the formalities required by the statute 14 & 15 Vic. ch. 109, sec. 16, to be observed. It is more than a mere supplement to by-law No 6.

It authorizes the only debentures that can ever have issued for the amount borrowed. It imposes for the first time in connection with the loan, a rate of 1d. in the pound to pay the interest, which is part of the debt. This is clearly not meant to be levied in addition to the rates specified in by-law No. 6. It is a new rate, and for a different amount of debt from that to which the published by-law related; and the rates authorized by No. 6 were, no doubt, not intended to be levied together with this new rate. Then, as we must look on by-law 8 as coming within the 16th clause of 14 & 15 Vic. ch. 109, it follows that the value of the whole of the assessable property of the township should have been stated in the body of the same by-law; and it should have been expressed that the rate of 1d. in the pound was imposed over and above all other rates. The same by-law also should have specified the sum to be raised in each year, irrespective (for the statute directs that) of the profits upon the road. It should have stated also the day when the by-law was to take effect. As the measure now stands, taking both by-

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laws together, we see that there is no rate imposed and appropriated to the liquidation of the debt, which will be sufficient in itself to ensure the discharge of the debt. On the contrary, other sources are relied upon primarily, and are not merely made available in aid of rates imposed, and by way of relief from those rates.

What the legislature meant by their statute is, that the creditor shall have his debt secured by rates, which would certainly pay it, with interest, at the expiration of the period limited, whatever aid the municipality might provide from other sources, to come in aid of those rates and to the relief of the ratepayers. But when we read the by-law No. 8 attentively, it seems clear that the municipality do not mean the rates imposed by by-law No. 6 to be levied.

And therefore by-law No. 8 authorized a debt to be created by the issue of debentures, which debt is not secured either by that or any other by-law, in the manner the statutes of the province imperatively require.

Rule absolute.

MATHESON V. MALLOCH.

Dower-Amendment in number of lot claimed-Proof of seizin.

In dower the demand served before action was directed to the tenant as tenant of lot No. 3 (the right lot), but in the body of the demand, and in the declaration on the record, the premises were described as lot 2; a description was however, given by metes and bounds, both in the demand and in the declaration, which shewed plainly what lot was intended. The plea denied the busband's seizin or said lot No. 2. The tenant at the trial, though he opposed an amendment, admitted that he had not been misled by the mistake. The learned judge allowed the amendment. Held, that he had authority to do so.

It was proved that the tenant held under conveyance made to the husband, and by the husband to another party. He admitted that he had both these deeds in his possession, and declined to produce them on notice.

Held, ample evidence of seizin.

Dower-Plea denying that the demandant's husband, William Matheson, was seized.

The demandant, before action brought, had served the tenant with a demand in writing of dower under the statute. This notice was addressed to him "as tenant of part of park lot No. 3, in the south west half of lot No. 2, in the 2nd concession of Drummond." In the body of the notice the premises were erroneously described as part of park lot

No. 2, in the 2nd concession of Drummond, putting the number of the lot in Drummond, which had been sub-divided into park lots, in the place of the number of the park lot out of which the dower was claimed. But the notice contained also a particular description of the premises by metes and bounds, which would serve to shew plainly what park lot was intended.

In the plaint, as entered on the Nisi Prius record, the premises were described as part of park lot No. 2, in the 2nd concession of Drummond, but the same description by metes and bounds followed the designation of the lot, as in the demand of dower that had been served, which description would sufficiently shew to any one acquainted with the town of Perth, and with these premises, what park lot must have been meant.

In his plea denying the husband's seizin, the tenant adopted the erroneous number that had been given in the plaint. So the issue to be tried was, whether the demandant's husband had been seized during coverture of the said part of park lot No. 2, in the 2nd concession in the township of Drummond, which no doubt he had not been. The error being discovered, the learned judge, Richards, J., was moved at the trial to allow the record to be amended by substituting 3 for 2, as the number of the park lot.

The tenant candidly admitted that he was not misled by the error, and though opposition was made to the amendment, the learned judge allowed it, and the trial proceeded, and resulted in a verdict for demandant.

It was contended by the tenant that the demandant did not give such evidence as entitled her to a verdict on the plea traversing her husband's seizin, and the verdict was taken subject to the opinion of the court upon this point.

In this term cross motions were made.

Richards obtained a rule nisi to shew cause why the postea should not be delivered to the demandant upon the verdict obtained in her favour.

Hagarty, Q. C., for the tenant, moved for a new trial, upon the law and evidence, for misdirection, and the admission of improper evidence, and upon affidavits. Both rules were

argued at the same time—Morgan v. Pike, 22 L. T. Rep. 242; 15 C. B. 473, S. C.: Bridger v. Gay, 23 L. T. Rep. 64; Wilkin v. Reid, Ib., 160, 15 C. B. 192 S. C., and Doe dem. Wilton v. Beck, 13 C. B. 329, were cited in support of the tenant's rule; and Stanton v. Windeat, 1 U. C. R. 30 Doe dem. Murray v. Smith, 5 U. C. R. 225; Doe dem. Notman v. McDonald, Ib., 321; Doe dem. Marriot v. Edwards, 6 C. & P. 208; Cameron's Rules 125-7, against it. Johnson et ux. McGill, 6 U. C. R. 194; Wannacott v. Fillater, 11 U. C. R. 51; and Lockman v. Ness, 5 O. S. 505, were cited as to the evidence of seizin.—See also, upon this point, Towsley v. Smith, 12 U. C. R. 558-9.

ROBINSON, C. J., delivered the judgment of the court.

As to the tenant's rule, which calls in question the right of the judge to make the amendment: The error certainly was a most material one, but it was not therefore the less in the power of the learned judge at the trial to permit the amendment, where he saw that it could not have prejudiced the defence. If he had refused it, his decision would have been final, and we should not have been disposed to find fault with such an exercise of discretion, for the error was of a kind that should not have occurred, and still less should have been allowed to remain undiscovered till the time of the trial. It could not have been so, if any attention had been given to the correctness of the record. As it is, all we have to determine is, whether the learned judge exceeded the authority given by the statute when he allowed the amendment; and we think he did not. He could clearly see that the tenant was not likely to have been misled by the blunder, and indeed he admitted that in fact he was not misled. This mis-statement is, no doubt, in a matter which lies at the very root of the action; yet, nevertheless, though such an amendment may have been refused in some instances, both in England and here, as not coming within a reasonable construction of the statute, yet in other instances amendments of the same character have been allowed, and the order has been upheld-See Archbold's Nisi Prius, "Amendment." And there is in this case this fact in favour of the amendment, that although the number of the lot was misstated, yet the description which was also given with it served to expose and to correct the error. The tenant intimates in his affidavits that if the lot had been called by its right number, he had a substantial defence, which he would have urged; but he does not specify any defence. If he had, and had applied for a new trial while it was open to him, with liberty to amend his pleading, we should have felt disposed to let him into such defence.

As to the evidence of Matheson's seizing, it seems to us to have been ample. The tenant was shewn to hold under a conveyance made to Matheson, and by Matheson to another party. He admitted that he had both of such deeds in his possession, and declined to produce them upon notice, and proof was given of the execution of the deed to the husband by a subscribing witness.

GILLIES V. WOOD.

Replevin—Cognizance under trustees' warrant to collect school rates—Demurrer—Form of warrant—13 & 14 Vic. ch. 48, sec. 12.

Under 13 & 14 Vic. ch. 48, school trustees can only give a warrant to collect school rates within the limits of the section for which they are appointed Semble, that such warrant is sufficient if signed by two of the trustees, and that it need not be under their corporate seal.

In making cognizance under such warrant, it is sufficient to state that the plaintiff was duly assessed, and that the collector, (the cognizor,) was duly appointed; it is not necersary to state that the rate was decided upon at a meeting, as required by the statute, or how the appointment was made.

Replevin—The defendant pleaded a cognizance as bailiff to the school trustees of school section No. six, township of Pilkington, and that because the plaintiff for a long time, i.e., 15 months next before the 11th of January, 1855, was a freeholder in said school section; and as such freeholder of such section, was by force of the statute liable to be assessed to pay rates for school purposes within such section; and the plaintiff, as such freeholder, and by force of the statute, was duly assessed to pay £2 14s. $1\frac{1}{2}d$., as his portion of school rates for the said section, for the 12 months ending 31st of December, 1854; that before the said time, to wit, on the 11th of January, 1855, M. C., J. B., & J. D., were the duly elected school trustees of the said section, and thereupon the said school rates became their property by virtue of the act passed in the session of the legislature

held in 13 & 14 Vic., ch. 48; that before the taking of the said goods, to wit, on, &c., defendant was the collector, duly appointed by the said school trustees to collect the said school rates; and that the said M. C. & J. B., a majority of said trustees, before the said time when, &c., to wit, on, &c., issued a certain warrant in writing under their respective hands, directed to said defendant as such collector, and annexed to said warrant a list of all the persons rated by the said school trustees for school purposes, and delivered the said warrant and list to defendant as such collector, by which said warrant and list the said M. C. & J. B., as such majority of the trustees, authorized and required defendant to collect from the persons named in the said list the sums set opposite their respective names; that £2 14s. $1\frac{1}{2}d$, was set opposite the name of the plaintiff; and the warrant further authorized and required defendant, in case any of the persons named should make default, &c., to levy from the parties so rated the said sums respectively, by distress of their gooods and chattels; that after delivery of the said warrant to him, and after ten days from such delivery, defendant required the plaintiff to pay him the said sum of £2 14s. 1\frac{1}{2}d., and the plaintiff refused, and so made default, whereupon defendant by virtue of the said warrants, took and detained the said goods as a distress for the said rate-wherefore defendant well acknowledges the taking, &c.

Demurrer—assigning for causes—1st. That the cognizance does not shew that plaintiff was a resident in school section No. 6. 2nd. Nor any authority in defendant to take said goods. 3rd. That the trustees could only levy such rate as might be imposed by the freeholders and householders of the school section at an annual or special meeting, and no such meeting is shewn to have been held. 4th. That the statute is not properly described. 5th. That if section No. 6 be at all legally established, its trustees are a corporation aggregate, whereas defendant makes cognizance under them as individuals only. 6th. That it appears that defendant was commanded by the warrant to levy the money within ten days after the delivery thereof, but it is not stated that the taking of said goods and chattels was within such ten days.

This objection was given up on the argument. 7th. That it is not shewn defendant was appointed collector by any by-law, or by resolution of trustees. 8th. That it is not shewn the taking, &c., took place within section No. 6; and the defendant noted also for argument that the cognizance does not shew how or at what time section No. 6 was formed, or how, or at what time, or in what manner the alleged trustees acquired a right to levy by distress, and shews no such right in them.

Hallinan, for the demurrer, cited De La Haye and The Gore of Toronto, 3 C. P. 23; Sheriff v. Patterson, 5 U. C. R. 620; Anderson v. Vansittart, Ib. 355; Croft v. Town Council of Peterborough, 5 C. P. 35.

S. M. Jarvis, contra.

DRAPER, J.—The 12th section of the school act (sub-section 8), authorizes the trustees to make out a list of the names of all persons rated by them for the school purposes of such section, and the amount payable by each, and to annex to such list a warrant directed to the collector of the school section for the collection of the several sums mentioned in such list; and by sub-section 11 the trustees are empowered to sue for and recover by their name of office the amount of school rates due from persons residing without the limits of their school section, and making default in payment. The second subsection authorizes the trustees to appoint a collector (who may also be secretary-treasurer, and therefore may be co-trustee, sub-section 1), to collect the rates they may have imposed, or shall impose on the inhabitants of their school section, or which the said inhabitants may have subscribed; and to pay such collector by a percentage; and every collector shall have the same power "by virtue of a warrant, signed by the majority of the trustees, in collecting the school-rate or subscription, and shall proceed in the same manner as ordinary collectors of county and township rates or assessment."

From these provisions (13 & 14 Vic. ch. 67, sec. 34), I deduce the conclusion, that the trustees can give no power by warrant to be executed, nor can the collector make any levy upon such warrant, unless within the limits of the school section for which such trustees are appointed; and that, as the plea neither avers that the plaintiff was a resident within such section, nor that the collector executed the warrant within

the limits thereof, the first objection is sustained; and also the second, so far as it points to the same question—i. e., that the collector had no authority to take the goods generally, but only within the limits of the school section. I am not prepared to decide in support of the second objection that the trustees should be shewn, in issuing this warrant, to have acted as a corporation. The cases of Anderson v. Vansittart (5 U. C. R. 335), and Sheriff v. Patterson (Ib. 620), cited in the argument, do not at all prove this, and there is a good deal to be said against it. As a corporation, their acts must, as a general rule, be attested by their corporate seal But the statute expressly authorizes a majority of the trustees to issue a warrant signed by them, not mentioning a seal. As a general rule of law, a justice of the peace should sign and seal every warrant he makes out.-2 Hawk. ch. 13, sec. 21; 2 Saund. 305, note 13; but Padfield v. Cabell, (Willes 411) shews that the particular language of a statute mayrender a seal unnecessary, and may perhaps be considered as going further; but then, if that be conceded, it may be fairly argued that, considering that the collector who receives the warrant may himself be one of the trustees, the legislature intended to confer an authority to issue such warrant on the trustees or a majority of them, not as a corporation, but as individual trustees; for putting the corporate seal would be the act of the whole corporation, not the mere act of a majority. When they are required to bring suit (sub-section 11 of sec. 12), they are bound to do so "by their name of office." The conclusion I am disposed to deduce is, that the signing of the warrant by the two trustees, though without sealing it, would be sufficient.

As the plaintiff must have judgment on the demurrer to this plea, it is not necessary formally so decide all the other objections taken. I have no objection to intimate my present impression with regard to some of them, though the judgment of the court is not based upon them. As to the third, I do not at present think it necessary that the plea should shew there was a meeting held, at which it was resolved to raise this sum of money. The annual school meeting required by section 2, and referred to in section 6 of 13 & 14 Vic. ch. 48, will, I think, be presumed to have been held,

as an omission to give the proper notice of it would be a breach of a prescribed duty-(section 12, sub-section 12). At that meeting the freeholders or householders of the section were authorized to decide on the manner in which all the expenses connected with the school should be provided for. The trustees or the municipal council of the township had authority to impose a rate—(section 12, sub-section 9); and it seems to me at present, that it cannot be necessary for the collector, who makes cognizance under the warrant, to set out the performance of all these acts; but that he may aver, as is done, that the plaintiff was duly assessed and rated, leaving him to reply the commission or omission of anything which would destroy that conclusion. The defendant is an officer justifying under a warrant which the trustees had primâ facie legal authority to issue. Enough is stated in the plea to disclose that.

I do not understand the fourth objection. The statute pleaded is stated to have been passed in the session of Parliament held in the 13th and 14th years of Her Majesty's reign. This is a correct description of it in point of fact. If it were stated to have been passed in the 13th and 14th years of Her Majesty's reign, it might have been different. The fifth is involved in some of the objections disposed of,

and the sixth was given up on argument.

The seventh is, I think, untenable. The defendant states he was a collector duly appointed. I do not think he need shew the manner of his appointment.

The eighth only raises, in a different form of words, objections already taken.

Judgment for plaintiff on demurrer.

LAMPKIN V. THE WESTERN ASSURANCE COMPANY.

Covenant on a policy of insurance, the conditions of which provided that losses should be paid in sixty days after the proof of them, and that no suit should be maintained unless commenced, within twelve months next after the cause of action should accrue. Plea, that the fire took place more than twelve months before the suit commenced. Held, no defence.

This was an action of covenant, on a policy of fire assurance for £250.

The conditions of it were set out in the declaration. The ninth provided for the proof of loss to be given by the insured, and that until production of such proof the loss should not be payable. The tenth, that payment of losses should be made in sixty days after the loss should have been ascertained and proved: and the fifteenth, "that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be maintained in any court of law or equity, unless such suit or action shall be commenced within the term of twelve months next after the cause of action shall accrue." (a)

Defendants pleaded that the fire took place, and the plaintiff's property and effects were destroyed, at a greater distance of time than twelve months, to wit, two years, before the commencement of the suit; and the plaintiff demurred to the plea as being no defence.

The plaintiff joined in demurrer, and took several exceptions to the declaration, which are not material to be mentioned, as the judgment of the court does not proceed upon them.

Hagarty, Q. C., for the demurrer. Eccles contra.

ROBINSON, C. J., delivered the judgement of the court.

I think the declaration is sufficient. It was not necessary for the plaintiff to aver that he brought his action within twelve months; and the plea is in my opinion bad, because it assumes that it was necessary to sue within twelve months of the loss happening, while the terms of the policy are, that the suit shall be brought within twelve months next after the cause of action shall accrue.

The defendants are not bound by the terms of the policy to pay till sixty days after the loss shall have been sustained and proved. It is not necessary to determine whether the plaintiff, by delaying to furnish his proofs for any unreasonable time, could prolong the time for bringing his action; but this at least is clear, that no action could be sustained within sixty days from the fire, because there could be no proof of loss till after it had occurred, and therefore it follows of

⁽a) See the report on motion for new trial, ante 237, in which the declaration is more fully set out.

necessity that the company have that period reserved to them for making enquiries and preparing to meet the demand.

In pleading that the plaintiff had not sued within twelve months from the time of the fire, the defendants have tendered an immaterial issue, since the tenth condition of this policy requires the twelve months to be reckoned from the time of the cause of action accruing, and not from the time of the fire occurring—Cowper v. Godmond (9 Bing. 748) is an authority to shew what seems indeed scarcely to require authority to support it, that the Statute of Limitations does not run till the cause of action is complete—in other words, till the plaintiff has a right to sue.

Judgment for the plaintiff on demurrer.

MARKLE V. THOMAS.

Case for false return of nulla bona to a Fi. Fa.,—Plea, that the plaintiff accepted such return, knowing it to be untrue, and issued a Fi. Fa. lands upon it. Held, no defence.

Case for false returns to several writs of execution. The pleadings will be found fully set out in the report of this case on motion for a new trial—ante page 321. The replications to the fourth and sixth pleas were demurred to; but it is unnecessary to notice the objections taken, as they were not decided. On the argument, these pleas were excepted to as insufficient on general demurrer. They were pleaded to so much of the declaration only as complained of the return of nulla bona to the Fi. Fa. against goods, and set up as a defence that the plaintiff accepted such return from the sheriff, knowing it to be false, and that he afterwards took out upon it a Fi. Fa. against lands.

VanKoughnet, Q. C., for the demurrer, cited Miller v. Thomas, 11 U. C. R. 303.

Martin contra, cited Freeman v. Cook, 2 Ex. 654; Lewis v. Clifton, 14 C. B. 245; Lines v. Grange, 12 U. C. R. 209; Wordall v. Smith, 1 Camp. 332; Holmes v. Clifton, 10 A. & E. 673.

ROBINSON, C. J.—We have first to consider whether the fourth plea constitutes a valid defence in substance.

The defendant's counsel was unable to cite in the argument

any decision supporting the plea. In Miller v. Thomas (11 U. C. R. 302) we held a plea good which stated that, in order to give the debtor indulgence by postponing the sale of his goods, the plaintiff requested the sheriff to make the return of nulla bona (as to the residue) complained of, and afterwards took out a writ of venditioni exponas with a full knowledge of the facts. There could be no doubt about that being a good defence, for it amounted in truth to leave and license. and a man cannot be suffered to complain of an act as wrongful, which was done at his own request, with a knowledge of all the circumstances. This plea comes short of that. It does not state that the return was made at the plaintiff's request. In Bays v. Ruttan (6 U. C. R. 266) we held a plea bad which relied upon the mere fact of the plaintiff having received and acted upon the return of nulla bona as true, and take out a Ca. Sa. upon it; and in giving judgment in that case it was remarked that the plea, to make it good, should have averred that the plaintiff accepted the return of nulla bona knowing at the time that it was false. That was probably said, having in view the decision of Abbot, C. J., in Bynon v. Garrat et al. (1 C. & P. 154), where the sheriff, upon a Fi. Fa. for £301, returned that he had levied £13, and that the debtor had no more goods. It was shewn that the plaintiff had taken out the £13, and he afterwards sued for the false return; but the Chief Justice held that by taking the £13, he had waived all further claims against the sheriff.

This, however, does not seem to be sustained by later authorities. In Holmes v. Clifton (10 A. & E. 675) the court expressed their dissent from it; and whatever effect it may be thought reasonable to give upon the trial to the fact of the plaintiff in the execution having accepted and acted upon the return with a knowledge that it was not consistent with the truth, I do not find authority for holding that it may be pleaded in bar as an absolute estoppel, though I confess it seems to me that it does seem reasonable that the plaintiff having accepted without remonstrance a return which he knew to be false, and having adopted and acted upon it, should be held to have acquiesced in it, and to be disabled on that account from complaining of it afterwards as injurious.

So long as he could be looked upon as ignorant of the truth, and to have taken the return upon his confidence in the correctness of the sheriff, he should of course not be prejudiced by accepting and acting upon it. But, governing ourselves by adjudged cases, I do not find that we can hold this plea to be good.

The sixth plea seems not to be materially different in substance from the fourth, and on the same grounds I think it is insufficient.

Burns, J.—The difference between the pleas excepted to in this case and the case of Miller v. Thomas (11 U. C. R. 302) is, that in the latter case the plea alleged that the plaintiff requested the sheriff to make the return he did make. In the present case there is no allegation that the plaintiff requested the sheriff to make a return of nulla bona. return appears to have been entirely the act of the sheriff himself. The first allegation is, that the plaintiff accepted the return of nulla bona, knowing it to be false. That allegation by itself could not preclude the plaintiff from questioning the truth of the return, for the plaintiff cannot in fact sue the sheriff for a false return till he has obtained some return of the writ. He may be compelled to rule the sheriff to return the writ in order to proceed against him, and he may believe that the return he will obtain will be nulla bona, and may know all the time that when obtained it will be an untrue return; but it would be quite too much to say, that having taken a return voluntarily to the same effect as he would be compelled by the law to take, he shall have no action against the sheriff to question the truth of the return. The remaining allegation in the pleas is, that the plaintiff treated the return as true, and acted thereon, and sued out subsequent writs. It is quite clear that these acts of the plaintiff do not in any respect alter the position of the defendants, and the defendant is not induced to do anything, or to omit anything, that in any way affects his liability. question in truth is, whether the plaintiff, in endeavouring to procure satisfaction of his debt by means of making it from his debtor's property, precludes himself from complaining of the defendant's conduct. The plaintiff does an act here to which the defendant is in no way a party, and with which he is in no way connected, neither has the act done by the plaintiff produced satisfaction of his debt; therefore I do not see how the plaintiff has precluded himself from proceeding against the defendant for a neglect of duty, if such exist. If what is contended for now be law, it amounts to this, that if the plaintiff accepts a return the truth of which he intends to contest, he must suspend all attempts to obtain satisfaction of his debt from his debtor until he has proceeded against the sheriff, if he complains that the sheriff has not done his duty. It may be that a jury may not be satisfied that a sheriff has so far acted wrong, or neglected his duty, as to impose upon him the responsibility of the whole debt due the plaintiff, or indeed any considerable portion of it; and surely it could never be right to tie up the plaintiff's hands from obtaining satisfaction from the debtor in the meantime. Suppose the action to be brought against the sheriff before any subsequent proceedings taking against the debtor, if it were the law that suing out a writ after a return of nulla bona with knowledge that it was untrue, precluded the plaintiff from suing, then it must follow that a plea puis darrein continuance would be good. If this be so, then the plaintiff must run the risk of taking what a jury will give him against a sheriff, and of losing all or a portion of his debt by delay of his proceedings against his debtor, or he must submit to the conduct of the sheriff. I see nothing unreasonable in allowing a plaintiff to procure satisfaction of his debt, at the same time that he complains that the conduct of the sheriff has caused him an injury; and I am of opinion that he is not estopped from the latter because he is endeavouring at the same time to effect the former.

Judgment on these pleas should, I think, be for the plaintiff.

DRAPER, J., concurred.

Judgment for plaintiff on demurrer. (a)

⁽a) See Aitken v. Moody, ante 169, reported since the argument of this case, in which it was held that a plaintiff having obtained a return of nulla bona—which the sheriff, who was indemnified by another party, said was the only return he would make—and sued out a Ca. Sa. upon it, was not precluded from an action for a false return.

KERBY ET AL. V. ELLIOT ET AL., EXECUTORS, &c.

Appeal from C. C .- Proof of foreign judgment where the court has no seal 13 & 14 Vic. ch. 19-Pleading-Grounds of special demurrer not appealable.

Debt on a judgment rendered in an inferior court in the United States. It was proved that the court had no seal, and the jndge's book was produced containing the judgment, and his handwriting and signature proved. Held, sufficient evidence of the judgment.

The defendants, executors of the judgment debtor, pleaded that the testator at the time of and for twenty years before the recovery against him and until his death, resided only in this province; and that the cause of action, if any, for which the judgment was obtained, arose here, and not within the jurisdiction of the foreign court; and that the said alleged cause of action did not accrue within six years before such recovery, or the commencement of that suit. Held, plea bad in substance.

Where nothing but costs are involved, this court will not reverse the decision

of the court below on a mere point of special demurrer.

APPEAL from the County Court of the county of Essex.

This was an action brought against the defendants, executors of one James Hagarty, upon a judgment rendered against the testator, at the suit of the plaintiffs. at a certain court held at Detroit in the state of Michigan, before Charles Peltier, Esq., judge of the said court, for \$148.92 cents damages, for the non-performance of certain promises, and \$3.80c. costs, averring a promise to pay by testator in his lifetime. Common counts were added for goods sold and delivered, &c.

The defendants pleaded, fourthly, to the first count: that the said James Hagarty, deceased, in his lifetime was at the time of the said supposed recovery against him in said court, and always has been, and was during a long space of time, to wit, twenty years next before the said time of the said supposed recovery, and afterwards until his death a resident of and in the county of Essex, in Canada, and was not at any time during said period a resident of the city of Detroit in Michigan, one of the United States, nor of any other place than Essex aforesaid; and that the cause of action, if any ever existed, of the plaintiffs against the said James Hagarty, in respect of which the said recovery in said first count is mentioned was obtained, arose in the said county of Essex, and not within the jurisdiction of the said court of judicature in said first count mentioned; and defendants in fact say that the alleged causes of action in respect of which the said

judgment was so recovered, did not, nor did any or either of them, or any part thereof, accrue to the plaintiffs at any time within six years next before the recovery of said judgment, nor within six years next before the commencement of this suit, wherein the said judgment was so recovered in said court of judicature: verification, &c.

5thly. To the remaining count; that the alleged causes of action did not, nor did any or either of them, accrue to the plaintiffs at any time within six years next before the commencement of this suit, &c.

Demurrer to the fourth plea-That the matter thereof is no defence to the cause of action in which it is pleaded; that the said plea, as it traverses the allegation in the said first count of jurisdiction in the said foreign court, should have concluded to the country, and not with a verification; that said plea is double and multifarious, in alleging as defences the several facts of the non-residence of Hagarty in the foreign country; the arising of the cause of action whereon said foreign judgment was obtained without the jurisdiction of the said foreign court, and the non-accrual of the said cause of action within six years next before the time of the recovery of said judgment, or within six years next before the time of the commencement of the suit wherein said judgment was recovered; and that said plea does not state that the matters therein contained would, if true, constitute a defence to the said action in the said foreign country, according to its laws, or that such matters would, if true, render such foreign judgment illegal, &c., according to the laws of said foreign country.

Replication to the fifth plea—That at the times when the said several causes of action in the fifth plea mentioned, and each and every of them did accrue to the plaintiffs, the plaintiffs were without the limits of this province, and that the plaintiffs did not at any time, from the time the said causes of action accrued, and each and every of them did accrue until within six years of the day of the commencement of this suit, come or return into this province: verification.

Joinder in demurrer to fourth plea; and demurrer to replication to fifth plea, on the following grounds—that the said

replication is not a sufficient answer to said fifth plea; that the issue sought to be raised thereby is two wide; that although it does state that the plaintiffs did not at any time from the time that the said causes accrued, and each and every of them did accrue, until within six years of the day of the commencement of this suit, come or return into this province, yet it does not allege that one or either of the plaintiffs did not so come or return into this province; that, for anything which appears by the said replication, one or either of the plaintiffs may have come or returned to this province, and resided within the limits thereof, more than six years next before the commencement of this suit.

On the above pleadings the case came down for trial and assessment of contingent damages at the sittings for Essex, in January last, when it appeared in evidence that Charles Peltier was a justice of the peace and an acting magistrate in Detroit; that he had jurisdiction over certain debts there to \$300, and could give judgment thereon; and that the court had no seal. A book was produced in which a judgment was recorded, and it was sworn by one of the witnesses that this judgment was rendered within the judge's jurisdiction; that this record book produced was his, and the judgment recorded there, which the witness remembered his rendering, was in his own hand-writing; that the case was tried before him; that defendant appeared with his witnesses and defended his case, and judgment was rendered against him for \$148 and 92c., and \$3 and 80c. costs-date of entry in book, 20th of March, 1854. The witness was allowed to take the judgment—the plaintiffs putting in a copy or extract of judgment as follows-namely :-- "Transcript of judgment. Assumpsit-George Kirby and Zebulon Kirby v. James Haggerty, February 8th, 1854-summons issued, returnable the 15th instant, at 9 o'clock, A. M., and returned, personally served, same day-February 15th, 1854. Parties in court, and plaintiffs declare in assumpsit on book account for goods sold and delivered, and for account stated, and claimed damages \$300. Defendant pleads the general issue and set off. At the instance of the defendant, this cause is continued on the 29th of March next, at 9 o'clock,

³ a-vol. XIII. Q. B.

P. M., at which time parties appear, and thereupon John Patton is sworn for the plaintiffs, and Daniel Semandre for defendant, and after hearing the evidence, judgment is rendered against said defendant in favour of said plaintiffs, for one hundred and forty-eight dollars and ninety-two cents damages, and costs and interest taxed at \$3.80c.

(Signed) CHAS. PELTIER, J. P."

O'Connor moved for a nonsuit, on the ground that the judgment was not proven, either according to 13 & 14 Vic. ch. 19, by an exemplification under the seal of the court, or otherwise sufficiently; and that the foreign court was not a court of record.

The learned judge below ruled, that the statutes only applies where the court has a seal, and that in other cases, and such as this, it is proved as before the passing of that act, though not shewn to be a court of record. Leave was reserved to move for nonsuit; and verdict rendered for £40 16s. 1d. The jury being charged that the evidence was sufficient to prove the judgment. In March term, O'Connor obtained a rule to shew cause why nonsuit should not be entered, or why verdict should not be set aside and a new trial had without costs, for the admission of improper evidence, and on the law and evidence. A. Prince, shewed cause. After argument, the learned judge (Chewitt, Co. J.) discharged this rule, adhering to the opinion expressed by him at the trial.

The demurrers were also argued in the court below, and the following judgment given upon them.

CHEWITT, Co, J.—As to the demurrer to the fourth plea—
If this plea had before verifying gone on and alleged (as I think it should have done specially, to make that defence available), that the defendant Haggerty had done everything in his power to place his defence in a proper way before the foreign court in which his case was tried, by pleading the Statute of Limitations in the foreign court specially (if necessary there), or under such allegations or form of plea as is permitted there, and had given or tendered sufficient evidence under such plea or form of allegation, notice, or as otherwise required there, to prove, or as would have proved, that the

Statute of Limitations would have barred it here, and also that the evidence of this state of facts constituting this defence under such plea or form of allegation so proven or tendered to be given, had, notwithstanding, been rejected by the foreign court, I should have held that the several allegations in the first part of that plea constituted but one entire proposition tending to that defence, which, in that shape, the authorities seem to point out as proper and available; but as this material part of the plea has been omitted, I think it is no defence to the first count, and therefore bad on demurrer—Warrener v. Kingsmill (8 U. C. R. 407 to 430), Guinness v. Carroll (1 B. & Ad. 459).

The counsel for the plaintiffs seemed to concur in the soundness of the demurrer to the replication to defendants' fifth plea; but I am inclined to think that the replication is sufficient, as if it were true that either or both of the plaintiffs had been in this country within six years, the defendant could take issue on it generally, as to both or the one, and on proof at the trial of the fact of one or both being so within, &c., it would be a bar to the plaintiffs recovering-Lafonde v. Ruddock (24 Eng. Rep. 239). In Greig et ux. v. Baird (1 U. C. R. 472), the replication is in this form; and in reference to that and other demurrers for matters more of form than substance, it has been thought that the court here is not bound to give effect to them-Outwater v. Dafoe (6 U. U. R. 257.) Indeed the county court acts no where mention special demurrer, whereby they sanction demurring generally, though the one may be considered to cover the other. It might, however, in many cases in the county court, be found necessary to give effect to special demurrers, even when not entirely concerning matters of substance, though perhaps difficult at the moment to instance cases of this kind.

In my judgment this case, on application for nonsuit and new trial, as well as on the several demurrers, is in some particulars by no means free from doubt, but it is the best opinion I can form of the law on these somewhat intricate points, and is in accordance with what is thought to be the very right.

The plaintiffs appealed from this decision, both on the rule and demurrers.

O'Connor for the appellants. A. Prince for the respondents.

The following cases were cited on the argument—Warrener v. Kingsmill, 8 U. C. R. 407; S. C. in Appeal, 13 U. C. R. 18; 2 Sm. Lea. Cas. 448 et sequ; Montreal Mining Co. v. Cuthbertson, 9 U. C. R. 78; Henderson v. Henderson, 6 Q. B. 288, per Lord Denman 298; Carus Wilson's case, 7 Q. B. 984, per Lord Denman, 1015; Woodruff v. Walling, 12 U. C. R. 501; Henry v. Adey, 3 East 221; Obicini v. Bligh, 8 Bing. 335; The Bank of Australasia v. Nias, 4 Eng. Rep. 252.

DRAPER, J.—I see nothing whatever to object to in the decision of the learned judge of the county court, upon the motion for nonsuit or for new trial. In my opinion, he was right in receiving the evidence, which we think was good evidence to prove the judgment, which in turn was good primâ facie evidence to sustain the plaintiffs' case, and there has not been anything advanced to impeach it.

The question for our decision is, on the sufficiency of the fourth plea to the first count, and on the sufficiency of the replication to the fifth plea to the second count.

We are of opinion that the fourth plea is bad. It commences by a statement that the defendants' testator was always a resident in the county of Essex, within this province, and never resided in Detroit, in the state of Michigan, nor in any other place out of the county of Essex. This appears to me, per se, an immaterial statement, unless he means to have it understood that he never was within the jurisdiction of the foreign court, and either was not personally served with process at all, or if served, the same was made in the county of Essex, beyond the jurisdiction of the foreign court. If this be the ground relied on, it is not so stated as to place such matter before us. The next statement is, that the cause of action on which the recovery in the foreign court was obtained arose wholly in the county of Essex. This may be, and yet, for all that is shewn, the cause of action may have been transitory. Then follows the averment that the causes of action on which the recovery in the foreign court was had, did not accrue within six years next before the recovery, nor within six years next before

the commencement of that suit. But it is not averred that this was offered as a defence in the foreign court, and overruled, or refused to be entertained and considered; or that it was against natural justice that the recovery should have been permitted in the foreign court. I think that upon matters of substance, the plea is bad, and that the decision of the court below, is right as to that.

As to the replication to the fifth plea, it is a mere question of costs; for that plea is to the second count, on which the plaintiffs offered no evidence, and on which therefore the defendants are entitled to the general verdict. Under these circumstances we should not feel called upon to reverse the decision of the court below, even if we entertained a different view, on a mere point of special demurrer. There is much sound practical good sense in the observations of the learned judge as to the principles which should govern him in cases of that description. In my opinion the appeal should be dismissed with costs.

Burns, J., concurred (a).

Appeal dismissed.

TAYLOR ET AL. V. JARVIS.

Case, for falsely returning nulla bona to a writ of Fi. Fa. after having levied the money. Plea, that the defendant in the writ had not any goods or chattels, out of which the defendant could have levied, &c. Held, on demurrer, plea bad.

CASE against the defendant, as sheriff of the united counties of York and Peel, for a false return of nulla bona to a writ of Fi. Fa. The declaration, after the usual statements down to the delivery of the writ to the sheriff, set forth that the defendant seized and took in execution divers goods and chattels of the said, &c. (the defendants in the Fi. Fa.) of great value, to wit, of the value of the money so endorsed on the said writ, and directed to be levied as aforesaid, and then levied the same thereout; yet the defendant, disregarding his duty, &c., afterwards falsely returned to the court upon the said

⁽a) The Chief Justice, having been absent during the argument, gave no judgment.

writ that the defendants (in the writ) had not any goods or chattels whereof he could cause to be levied the debt, &c. Plea, that the defendants (in the writ of Fi. Fa.) had not, nor had either of them, any goods or chattels within the defendant's said counties, &c., out of which the defendant could have levied the moneys endorsed on the said writ, or any part thereof, &c.

Demurrer, because the plea is no answer to the action, which is not an action for the levying, but for not paying over after levying; and that the plea is bad for not concluding to the country, instead of with a verification.

M. VanKoughnet, for the demurrer, cited Stubbs v.
Lainson, 1 M. & W. 728; Wright v. Lainson, 2 M. & W. 739,
C. Robinson, contra, cited Wintle v. Freeman, 11 A. & E.

530; Ch. Plg. II. 268.

BURNS, J., delivered the judgment of the court.

It is true that in Wintle v. Freeman, (11 A & E. 540) a plea precisely similar to that used in this case was pleaded, and a replication to it, and issue taken, and that judgment was given upon the plea, under the facts proved, in the defendant's favour; but there no objection was raised to the plea. The facts proved authorized the court in saying that the plea was true, inasmuch as there was no goods applicable to the satisfaction of the plaintiff's demand. In the present case, the defendant does object to the plea as not traversing the material allegation in the declaration; and therefore it is similar to the case of Drewe v. Lainson, (11 A. & E. 529.) It was there decided that the allegation in the declaration, that the defendant "then levied the same thereout," not only meant that the sheriff seized and sold the goods under the plaintiff's writ, but that the defendant had the proceeds in -hand for the purpose of handing the same over to the plaintiff; for if it did not mean that, the plaintiff would shew no right upon the face of his declaration to maintain the action. being the true view of the declaration, it follows that the defendant should deny that he levied the moneys on the plaintiff's writ from the goods; and then, as Lord Denman says, this would put in issue three questions-1. Whether the goods were sold at all; 2. Whether they were sold under the plaintiff's writ; and 3. Whether the proceeds were

applicable to the plaintiff's writ. The defendant would, in such case, be placed in precisely the same situation as in a case where he could properly plead that the debtor had no goods out of which he could make the amount endorsed on the plaintiff's writ. In Chitty's Precedents a plea is given to meet a declaration framed as this is, taken from Stubbs v. Lainson 1 M. & W. 728). The vice of the plea in this last case was, using the word and after denying the seizure, saying and did levy the money; it raised too large an issue: the allegation should have been in the disjunctive.

The real objection, however, to this plea, is, by saving the execution debtor had no goods it amounts to an argumentative denial that the defendant levied the money upon the writ. The question then is, whether that objection sufficiently appears upon the face of the demurrer as the point intended to be urged. If the cause assigned had merely stated that the plea was no answer to the declaration, it would not have been sufficient; but the demurrer says it admits the plea would have been good if in answer to a complaint for not levying, but complains against the plea, because the declaration charges the defendant with not paying the money levied. As before stated, that is the true view of the declaration, and then, when the plaintiff complains that the defendant does not properly answer that, but answers another view, we cannot suppose the parties were ignorant of the point to be argued, or that the defendant is misled in any way. No precise form of words are required in pointing out an objection as a cause of complaint against a pleading. The question is, whether what is said sufficiently conveys to the understanding what the point is which is intended to be urged. It would have been better had the pleader been more precise in the language used, so as to have avoided any difficulty on so useless a subject; but we think we can see in the language used what was intended. Judgment should be for the plaintiff.

Judgment for plaintiff on demurrer.

SNURE V. THE GREAT WESTERN RAILWAY COMPANY.

16 Vic. ch. 99 sec. 3—Effect of sec. 10—Navigable stream—Pleading.

The 16 Vic. ch. 99 sec. 10, saves the right of action for the whole damage suffered, where the suit is brought within six months after the injury has ceased.

Held, that in this case the declaration and ninth plea (set out below), taken together, sufficiently shewed that the stream in question was a navigable stream, and capable of being used by boats for the purpose of commerce.

The declaration charged the defendants with obstructing the navigation of the stream by building a bridge across it. The ninth plea—after setting out the incorporation of defendants, and the powers thereby given to them to cross streams, provided that the free and uninterrupted navigation thereof should not be interfered with by the said railway—alleged that they had erected the bridge under such powers for the purpose of their railway, and thereby unavoidably a little impeded the navigation for a short time. Held, plea, bad, as showing no defence.

CASE—The declaration complained, in the first count, that whereas, before and at the time, &c., the plaintiff was, and has been, and still is, possessed of a certain parcel of land in the township of Louth, and of a certain tannery situate thereon, and adjoining a certain stream of water called the Twenty Mile Creek, flowing through and from the said land and tannery, and past the same into Lake Ontario, and which said stream always, before and up to the time of the grievances, &c., had been and was navigable, and traversed and used for purposes of commerce, and business, by vessels and boats of various kinds and descriptions, from Lake Ontario up to and beyond the said tannery and land of the plaintiff, and thence down again to the said lake, and had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow, through, from, up to, and past the said land of the plaintiff as aforesaid, in its natural course and channel, free from any interruption or obstruction that would in any way impair or interfere with the navigation thereof by vessels of any description capable or fit for navigating the same, -and whereas, before and at the time, &c., the plaintiff carried on in the said tannery the business of tanning into leather the hides and skins of various dead animals, and in and for the purposes of his said business required and used at and in the said tannery large quantities of bark; and whereas the plaintiff was, and had been up to the time of the committing of the said grievances, in the habit of procuring such bark as he so required

as aforesaid to be brought to his said tannery in and by vessels navigating the said stream, and could and can only (except at, a cost which would have left or would leave him no remuneration in his said business) procure such bark to be so brought to his said tannery; and was also in the habit of importing and bringing to his said tannery, by the same means, hides to be tanned into leather as aforesaid, and of exporting from his said tannery leather, hair, and other material made and taken from said hides, down the said stream by means of vessels navigating the same, and thereby using the said stream by means of boats and vessels navigating the same between the said parcel of land and the said lake, and thereby and by such use of the said stream the plaintiff derived great profit and convenience. defendants, well knowing, &c., but contriving and intending to injure the plaintiff, heretofore, to wit, on, &c., wrongfully and unlawfully erected, placed, and put in, over, and across the said stream, and have thenceforward wrongfully and unlawfully kept and continued so erected and put in and across the said stream, between the said parcel of land and the said tannery of the plaintiff and Lake Ontario, a certain bridge, or communication by way of a bridge, between the banks of the said stream, of such shape, size, &c., and in such a position, that thereby and by means thereof, the navigation of the said stream was then and has ever since been interrupted and impeded, and to such an extent that vessels such as had been theretofore accustomed to navigate the said stream, and to pass and repass thereon between the said lake and the said parcel of land and the said tannery, and to convey back hides and other material to and from the said tannery of the said plaintiff, have from thence hitherto been prevented thereby from so passing or repassing, or navigating the said stream, and all communication along and by means of the said stream between the said parcel of land and the said tannery of the plaintiff and the said lake, has been stopped and prevented; whereby the plaintiff has not only lost and been deprived of the profits and advantages of the said business, and has been unable to procure bark to be delivered at his said tannery, so that he could not work the said tannery or proceed with his

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said business, and has been forced to pay and lay out much larger sums than he otherwise would, in the purchase and delivery of bark at his said tannery for the necessary purposes of his said business, &c.

The second count alleged the plaintiff's possession of certain other parcels of land, tavern, and houses thereon, through, by, and along which the said stream, called the Twenty Mile Creek, has ever flowed, and does still flow on its course into Lake Ontario, the same having always been navigable, in like manner and to the like extent as in the said first count stated, from Lake Ontario up to, through, past, and beyond the said parcels of land which are situated higher up the said stream, and beyond the said premises in the said first count mentioned and referred to, until the time of the committing by the defendants of the said grievances. And whereas by means of the said stream, divers vessels had, up to the time of the committing the said grievances, been accustomed to pass and repass up and down the said stream, between the said parcels of land and the said lake, and thereby a considerable and valuable traffic and convenience had theretofore been carried on with the said plaintiff at the said stores and in, and the said premises of the plaintiff had been thereby greatly improved in value, and thereby great convenience and facilities of communication had been afforded thereto and therewith; yet the defendants not regarding the same, but contriving to injure the plaintiff, wrongfully and unlawfully, to wit, at the time and in the manner in the said first count mentioned, erected and placed, and have ever since caused to be kept erected and placed, the said bridge in the said first count mentioned, so that thereby and by means thereof vessels which had theretofore been accustomed to pass to and fro along the said stream, between the said parcels of land and the lake, have from thence hitherto been prevented from so doing, and all communication between the said parcels of land and the said lake, and the navigation of the said stream, have thereby been prevented and stopped, and the traffic and commerce of the kind-which has been above referred to has been stopped and put an end to thereby; and the plaintiff has been not only deprived of the great profits

and advantage which he would and could otherwise have derived therefrom, and been put to great inconvenience, loss, and damage, by the said interruption of the said navigation; and the said parcels of land and premises of the plaintiff have also by reason thereof been and become greatly injured and deteriorated in value, &c.

The ninth plea, to both counts, stated defendants' incorporation under the 4 W. IV. ch. 29, 8 Vic. ch. 86, and 16 Vic. ch. 99, and the powers given them to enter on lands, to construct and maintain piers, arches, &c., in, upon, and across rivers and brooks, &c., doing as little damage as might be, and making satisfaction in manner therein mentioned for all damage to be sustained by the owner or occupiers of such lands, &c.; also the power to take land, &c., in, upon, along and across any navigable stream, river, or water whatsoever, and to take any easement thereto, being of a public or private character, "provided always that the free and uninterrupted navigation of the said streams, lakes, rivers, and other waters so used, for all boats, ships, and vessels passing or repassing the same, should not be interfered with by the said railway;" and that the owners or occupiers of any lands or private privileges so taken should be compensated; that the said stream, being a public navigable stream, was in the line of their railway, and that defendants, under their powers given in the said acts, built a bridge across it for their railway, and being part of the said railway, and in so doing unavoidably obstructed a little the navigation of the said stream for a short space of time, quæ sunt, eadem, &c.

Tenth Plea.—As to so much of the causes of action as accrued more than six months before this suit, that the plaintiff ought not to maintain his action, because the said causes of action and damages in respect thereof, did not accrue within six calendar months next before this suit.

The plaintiff replied to the ninth plea that he brought this action not only for the obstruction admitted, but that defendants had continued such obstruction up to the commencement of this suit.

And to the tenth plea, that the injury and damage sued for was from the committing thereof to the commencement of this suit a continuing injury and damage.

Demurrer to the replication to the ninth plea, that as to so much of the grievances in the declaration mentioned as in and by the said ninth plea is or are justified, the plaintiff in his said replication doth not answer the said plea by either admitting or denying the matters in the said ninth plea set forth; that the plaintiff hath not taken or tendered any single or material issue on the said ninth plea, nor confessed and avoided the matters therein stated; and that the replication in this respect double and multifarious.

Demurrer, also, to the replication to the tenth plea, but no causes of demurrer were assigned in the demurrer book.

The plaintiff joined in demurrer to the replications, and gave notice of the following exemptions to the pleas:—that the ninth plea of the defendants contain no matter of defence in this cause; that said plea on the face of it admits a part of the causes of action alleged, and offers no defence thereto; that it is totally inapplicable to the declaration in this cause, and affords no defence thereto, and is neither in bar nor in confession and avoidance thereof.

That the tenth plea of the defendants is no defence to any part of the causes of action in this suit, and is totally inapplicable to the declaration in this cause, or to any part thereof.

The defendant also gave notice of exceptions to the declaration—that it does not sufficiently shew title in the plaintiff; that it does not appear in or by the declaration whether the obstructions therein complained of are to a public highway or to a private right; that it does not appear therein that the stream therein mentioned is a public highway for all the Queen's subjects to use at their free will and pleasure, nor does it appear therein that the plaintiff had a private right to the use of the said stream; that it is inconsistent with the statement in the declaration, that the said stream may be and may have been at all times the private property of some other party or parties, and that the using thereof, as stated in the declaration, was by the mere sufferance and permission of such other party or parties; nor does it appear by the declaration what kind or description of boats, vessels, or crafts, had been used to navigate the said stream, whether

Indian canoes or rafts, or anything that could properly be said to navigate a stream.

Connor, Q. C., (Galt with him), for defendants, cited in support of the exceptions to the declarations,—Woolrych on Waters, 42; The Mayor of Lynn v. Turner, Cowp. 86; Miles v. Rose, 5 Taunt. 705; The King v. Montague, 4 B. & C. 602; The Aylesbury R. W. Co. v. Mount, 2 Railw. Cas. 680; Manser v. The Northern and Eastern Counties R. W. Co., Ib. 391; The Queen v. Myers, 3 C. P. 305.

In support of the 9th plea, Priestly v. Manchester and Leeds R. W. Co., 2 Railw. Cas. 134; 4 Wm. IV. ch. 29, sec. 9; 16 Vic. ch. 99, secs. 4, 10. In support of the tenth plea, the Kennet and Avon Canal Co. v. The Great Western R. W. Co., 4 Railw. Cas. 90; Jones v. Bain, 12 U. C. R. 550.

VanKoughnet, Q. C., for the plaintiff, cited Jeffries v. Williams, 5 Ex. 792; Hilton v. Whitehead, 12 Q. B. 737.

ROBINSON, C. J., delivered the judgment of the court.

The statute 16 Vic. ch. 99, sec. 10, provides "that all suits for indemnity for any damage or injury sustained by any person or persons, whomsoever, by reason of the said railway, shall be instituted within six calendar months next after the time of such supposed damage sustained; or, if there shall be continuation of damage, then within six calendar months next after the doing or committing such damage shall cease, and not afterwards."

The effect of this is to save the right of action for the whole damage, where the suit is brought within six months after the injury has ceased, and of course the action is saved as to all the damage so long as the injury continues. Our judgment is therefore for the plaintiff upon the demurrer to the replication to the tenth plea. (a)

As to the ninth plea, that is pleaded as a defence to both counts; and it appears to us that the declaration and ninth plea, taken in connection, make it plain enough that the

⁽a) It would appear that this plea is bad for the same reason as the seventh plea in the next case, inasmuch as neither the declaration nor plea shew that the act complained of was done by defendants under colour of their charter.

stream in question is a navigable stream, capable of being used by boats, vessels, &c., for the purposes of commerce; and the complaint is, that the defendants have wrongfully obstructed the navigation on that stream, whereby the plaintiff has sustained a special damage.

It is not taken as an exception that the special damage stated was not of such a nature as entitles the plaintiff to bring a private action for what is described in such a manner as shews it to be a public nuisance.

The declaration appears to us to be in substance sufficient, at least so far as regards any exception of which notice has been given.

Then in the ninth plea the defendants, admitting the stream to be navigable by vessels, boats, &c., justify the placing a bridge across it, as being an act necessarily and legally done by them in the construction of their railway; but they set out also in their plea the very enactment of the statute 16 Vic. ch. 99, sec, 4, which provides that the free and uninterrupted navigation of the rivers and other waters used for all boats, ships, &c., passing or repassing the same, "shall not be interfered with by the said railway."

The plea states that the bridge complained of "is part of the railway." If that be so, it is difficult to understand how the interruption which it is admitted to have occasioned to the navigation can have been only temporary, yet it is alleged in the plea that such was the case, and that the defendants only obstructed the navigation for a little time. They do not however allege that they removed the bridge, or made such alteration in it as to put an end to the nuisance complained of, and, at any rate, what the statute directs is, that the navigation shall not be interfered with, but "shall be free and uninterrupted."

We consider the fourth clause as substituted for the previous enactment upon this point, and that it requires that the navigation shall be left open at all times.

We give judgment for the plaintiff also on this demurrer to the replication to the ninth plea.

Judgment for plaintiff on demurrer.

WISMER V. THE GREAT WESTERN RAILWAY COMPANY.

G. W. R. W. Co.-16 Vic. ch. 99, sec. 10 .- Pleading.

Declaration charged the defendants, a Railway Company, with wrongfully and unlawfully erecting a bridge across a certain stream, Defendants pleaded, (seeking to take advantage of the 16 Vic. ch. 99, sec. 10,) as to such of the causes of action as accrued more than six months before the suit, that the plaintiffs ought not to maintain their action, because such causes did not accrue within six months. The plaintiff replied that the injury sued for was a continuing damage. It was not alleged, or shewn in any way, either in the declaration or plea, that the bridge was erected under the defendants' charter, or for the purposes of their railway. Held, therefore, on demurrer to the replication, that the plea was bad—Held also, that if the defence had been properly pleaded, the replication would have been good.

CASE. The declaration contained only one count, framed in the same manner as the first count in the last case. The plaintiff was a wharfinger and warehouseman occupying part of the lot adjoining Snure's, and the special damage complained of, was the injury to him in such business.

Seventh plea, as to so much of the said causes of action of the said plaintiff, and all damages in respect thereto, as accrued more than six calendar months before the commencement of this suit, the defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof, against the defendants in respect thereof, because they say that the said causes of action and damages in the introductory part of this plea mentioned, did not, nor did any or either of them, or any part thereof, accrue to the said plaintiff at any time within six calendar months next before the commencement of this suit, and this the said defendants are ready to verify; wherefore they pray judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against them, as to the said causes of action and damages in the introductory part of the plea mentioned.

Replication—That the plaintiff ought not be barred from having or maintaining his aforesaid action against the defendants, in respect of the damage in the introductory part of the plea mentioned, by reason of anything therein alleged, because he says that the injury and damage in respect of which the plaintiff sues in this action have been and were, from the time of the committing and the occasioning thereof, as in the declaration stated, down to the time of

the commencement of this suit, a continuing injury and damage, and this the plaintiff is ready to verify; wherefore he prays judgment if he ought to be barred in manner aforesaid, &c.

Demurrer, that the matter alleged in the said replication is only applicable in law to so much of the said grievances as are not mentioned in the introductory part of the said seventh plea, whereas it is pleaded as an answer to the matters mentioned in the introductory part of the said plea.

Joinder in demurrer, and notice of exceptions to the plea, that the same is no defence to any part of the causes of action in this suit.

Similar exceptions were also taken to the declaration as in the preceding case; and the two cases were argued together, and by the same counsel.

RÖBINSON, C. J., delivered the judgment of the court.

There is nothing in the declaration to shew that this action is brought "for any damage or injury sustained by reason of the railway." We see, it is true, that the action is brought against the Great Western Railway Company, and we know judicially that that company has authority given to it to do certain acts, which, if done without such legal authority, would be unlawful, and would form good grounds for actions of trespass.

But the charge is, that the defendants wrongfully and unlawfully erected the bridge complained of, which indicates something done that they had no authority to do, and not anything properly done in the construction of their railway. The company, although only empowered by law to do acts in furtherance of their railway, are yet, as a matter of fact, capable of committing unlawful injuries against the property of others, which may have no relation to or connection with the railway which they are authorized to construct, and for all that appears the putting up this bridge may be such an act. It is not spoken of in the declaration as a railway bridge, or as a structure that has anything to do with the railway. For all that appears on the record, it may be a bridge put up merely to give their servants or workmen a more convenient road to the next town.

The seventh plea does not shew, any more than the declaration, that this is a case to which the tenth clause of the 16 Vic. ch. 99 applies, which is relied upon as limiting the action; and as the declaration has not shewn that, it was necessary that the plea should state it. For want of that, the plea is clearly insufficient, and the plaintiff must have judgment.

If it had appeared in the pleadings that this was a case within the tenth clause referred to, then we have no doubt that the replication would have been good, as shewing that the action was in time for the whole injury, for that is clearly the effect of such a provision as is contained in the tenth clause.

So that on either ground the plaintiff is entitled to judgment, the plea being bad and the replication good.

Judgment for plaintiff on demurrer.

HUNTER V. WALLACE.

Payments made to an executor $de\ son\ tort$ form no defence to an action by the rightful executor.

Assumpsit by the plaintiffs, Peter Hunter, and Sarah his wife, administratrix of Henry Bradley, on the common counts for money had and received. The declaration contained two counts, the first alleging a promise to the testator; the second to the plaintiff.

The defendants pleaded to each count, that at the time of the decease of said Henry Bradley, the said moneys in the declaration mentioned were in the hands of the defendants as trustees of the Newcastle District Savings Pank, the said moneys having been deposited with them as such trustees by the said Henry Bradley in his lifetime, and after the death of said Henry Bradley, who died intestate; and before the issuing of said letters of administration to the said Sarah Hunter, and before any letters of administration had been granted to the estate and effects of said Henry Bradley, a person unknown to the defendants, constituted himself by his own acts an executor de son tort of the estate and effects of the said Henry Bradley; and the said person afterwards, and

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before any letters of administration had been granted as aforesaid, and still being such executor de son tort as aforesaid, to wit, on the 4th March, 1854, came to the said bank or place of business of the defendants, and demanded of them the payment of the said moneys aforesaid, at the same time presenting to them the book which had been given to the said Henry Bradley in his lifetime by the said defendants, and which contained the entries of the deposits made by the said Henry Bradley in his lifetime with the said defendants, and the receipts by him from the said defendants, as such trustees as aforesaid, in his lifetime; and the defendants thereupon, believing the said person to be the rightful representative of said Henry Bradley, and entitled to receive the said moneys, thereupon paid the said moneys to the said person: verification.

The plaintiff demurred to these pleas as shewing no defence. J. D. Armour, for the demurrer, cited Thomson v. Harding, 2 Ell. & Bl. 630; Mountford v. Gibson, 4 East 453; Allen v. Dundas, 3 T. R. 125.

D. B. Read, contra, cited Wms. on Exrs. I. 191, 3rd Ed.; Com. Dig. "Administrator," C. 1.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt these pleas are insufficient. They set up as a defence a payment made to a person who was not legally entitled to receive it. Payments made by an executor de son tort, if they were such as a rightful executor could be compelled to have made, have been sanctioned so far that the executor de son tort has been held to be protected to the extent of such payments.

But those who are indebted to the estate, in order to be safe, must take care that they pay to the person legally authorized to represent the estate. The pleas are manifestly insufficient.

Judgment for plaintiffs on demurrer.

BENNER ET AL. V. BURTON ET AL.

Action against attorneys for not taking confession—Plea of composition by plaintiffs with the debtor—Statement of retainer and damage—Pleading.

Case against the defendants, as attorneys employed by the plaintiffs, for not taking a confession of judgment from one L. their debtor. Plea, that after the retainer, and before the alleged default of the defendants, and before the retainer, and before the atteget detail of the defendants, and before the commencement of this suit the plaintiffs, without the consent or con-currence of the defendants, together with other creditors, made an ar-rangement with L. by which he assigned all his effects to B., one of the plaintiffs, and another person, to be disposed of and the proceeds applied in paying such creditors as should concur in this arrangement. *Held*, on demurrer, plea good.

Held also, that in the declaration (set out below) the retainer of defendants

as attorneys, and the damage sustained by the defendants were sufficiently

stated.

CASE—The plaintiffs declared in the first count that one Land was indebted to the plaintiffs in a large sum of money, to wit, £1500, and the said L. was then and for a long time thereafter possessed of certain goods and chattels more than sufficient to pay and discharge his said indebtedness to the plaintiffs, and was then ready and willing to give to the plaintiffs any security in law, or legal instrument for his said debt to the plaintiffs in priority to his other creditors, as would without necessarily, as a legal consequence thereof, operate in law to close up the business of the said L. who then was carrying on the general business of a merchant, yet enable the plaintiffs, in case the said L. should prove unable to meet his engagements, to realise their said debt out of the said goods and chattels of the said L. in preference to any other of his creditors; that thereupon the plaintiffs, at the request of the defendants, who were then and still are partners in the profession of attorneys, and practising as attorneys of the courts of Queen's Bench and Common Pleas at Toronto, retained and employed the defendants as such attorneys, to procure and obtain from the said L. a certain legal instrument or security called and known as a confession of judgment, whereby the said L. would confess his said indebtedness to the plaintiffs, and would agree to allow judgment to be entered up therefor forthwith against him the said L., so as to enable the plaintiffs, if they should find it necessary for their protection and the realizing of their said debt, to issue execution and levy the same out of the said goods and chattels of the said L. in preference and priority to his other creditors,

which said confession of judgment the said L. was then ready and willing to execute and give to the plaintiffs; and the defendants thereupon accepted and entered upon the said retainer and employment, to wit, on &c., and it then became and was the duty of the defendants to use and exercise all due endeavour and diligence in procuring from the said L. the said confession of judgment yet the defendants, not regarding their duty in that behalf, or their said retainer and employment, and although a reasonable time had elapsed for the same before the commencement of this suit, contriving and intending, &c., did not nor would use due endeavour and diligence in procuring the said confession of judgment, but wholly neglected and omitted so to do; and afterwards, to wit, on, &c., wrongfully and injuriously, so carelessly and negligently conducted themselves as such attorneys in the premises, that by reason of their want of due endeavour and diligence in the premises all benefit and advantage of the priority and preference which the said L. was so ready and willing as aforesaid to give and secure to the plaintiffs, was wholly lost to the plaintiffs.

Second count—That the plaintiffs, at the request of the defendants, had retained and employed them, the defendants, who then were and still are in partnership as attorneys of the courts of Queen's Bench and Common Pleas at Toronto, and practising therein as such attorneys, to procure and obtain from the said L. in first count mentioned, who was then indebted to the plaintiffs in a large sum of money, to wit, &c., and was desirous of giving to the plaintiffs some security therefor, a confession of judgment confessing the indebtedness of him the said L. to the plaintiffs, and by means of which said confession the plaintiffs would be enabled to enter up judgment against the said L. for the said debt, and levy the same of his goods and chattels; and the defendants then accepted and entered upon the said retainer and employment, and thereupon it then became and was the duty of the defendants to proceed diligently and carefully, and to use all due endeavour to procure and obtain from the said L. the said confession of judgment; yet the defendants, not regarding, &c., but contriving, &c,, did not nor would, although a

reasonable time for procuring such confession of judgment had long elapsed before the commencement of this suit, proceed diligently and carefully, and use due endeavour to procure and obtain the said confession of judgment from the said L., but on the contrary thereof wholly neglected and omitted so to do, and otherwise so negligently and carelessly conducted themselves in the premises, that the said debt of the said L. to the plaintiffs has become and been wholly lost to the plaintiffs.

The third count set out that the plaintiffs, at the request of the defendants, had retained and employed the defendants, who then were and still are in partnership as attorneys of the court of Q. B. and C. P., practising their said profession as such attorneys in and of the same courts, for fees and rewards to the defendants in that behalf, to procure for the plaintiffs, as such attorneys as aforesaid, from one L., who was then indebted to the plaintiffs in a large sum of money, to wit, &c., a confession of judgment therefor from the said L. to the plaintiffs, which said confession he the said L. was then ready and willing to give to the plaintiffs; and to keep and retain the same for the plaintiffs as their attorneys in that behalf, in order that judgment might be entered thereon, and an execution be issued thereon, if the same should be necessary to secure the said debt to the plaintiffs. It then alleged the duty of the defendants to obtain such confession within a reasonable time, and to keep it, as attorneys for the plaintiffs, for the purpose aforesaid, &c., and that, although the defendants did procure the confession, yet the same was by their negligence lost and mislaid, and although it afterwards became necessary to enter judgment thereon, to secure the plaintiffs, yet the plaintiffs were prevented by such loss from causing this to be done, whereby the debt was lost, which would otherwise have been secured.

The fourth count stated the retainer by plaintiffs of the defendants, as attorneys, for fees and reward, to prosecute a certain action against L. for money claimed from him; and alleged as a breach of duty their neglect to bring such action.

Sixth plea, to the first count, by way of estoppel, after that the said retainer and employment, and before the said alleged

default of the defendants, and before the commencement of this suit, to wit, on, &c., the said L., by a certain indenture made between himself of the first part, and one Isaac Buchanan, and the said Richard Benner, one of the said plaintiffs, of the other part, and the several persons and firms, creditors of the said L. who should execute the said indenture within thirty days from the date thereof, of the third part which said indenture, sealed with the seal of the plaintiffs, being in the possession and under the control of the said Richard Benner, the defendants are unable to produce to the court here; granted, assigned, &c., unto the said Isaac Buchanan and the said Richard Benner, all the estate, real, personal and mixed, whether lands, goods, chattels, debts, &c., upon certain trusts therein mentioned; that is to say, upon trust to sell and dispose of the said estate, and collect and get in the said debts, and after payment of the expenses attending such sales or such collection, and the expenses attending the execution of the trusts thereby created, and the payment of £100 to one L., to apply the residue in and towards the payment and satisfaction of the several debts and sums of money due and owing by said L. to said creditors, the parties of the third part, and to pay the surplus, if any, to the said L.; that on the day and year aforesaid, the said Buchanan and Benner took upon themselves the execution of the said trusts, and that afterwards, to wit, on, &c., the said plaintiffs, within the period in the said indenture named for that purpose, and without the consent or concurrence of the defendants, or either of them, subscribed and sealed the said indenture as parties thereto of the third part-verification: wherefore they pray judgment if the plaintiffs ought to be admitted or received to say that the defendants so carelessly and negligently conducted themselves as such attorneys in the premises, that by reason of their want of due endeavour and diligence all benefit and advantage of the priority and preference which the said L. was willing to give was lost to the plaintiff.

The eighth plea was similar to the sixth, but pleaded to the second count.

Tenth plea, that after the said retainer and employment, and before the commencement of this suit, to wit, on, &c., by a

certain indenture then made between the parties in the said sixth plea mentioned, the said L. assigned all his estate and effects therein specified, for the purpose therein mentioned, which said indenture being in the possession of the said Richard Benner, the defendants are unable to produce the same to the court here: - that afterwards, to wit, on, &c., the plaintiffs subscribed and sealed the said indenture as creditors of the said L. and for the residue of the debt as alleged or claimed to be due to them as in the declaration mentioned, the said L. before the commencement of this suit, to wit, on, &c., by a certain indenture of bargain and sale, which being in the possession of the said Benner they are unable to produce to the court here, conveyed to the said Richard Benner and one Isaac Buchanan a certain piece or parcel of land and premises therein mentioned, which said indenture the said plaintiffs then accepted and received in full satisfaction and discharge of the residue of the said debts, and all causes of action in respect thereof: verification.

Demurrer to the sixth plea-That the matters in the said sixth plea stated are not sufficient to estop the plaintiffs from alleging the matters in the introductory part of that plea stated: and because it is not shewn in the said sixth plea that the plaintiffs subscribed or sealed the said indenture in the said sixth plea mentioned before the default of the defendants in the first count of the declaration stated; and because the said sixth plea does not shew whether the plaintiffs so subscribed before or after such default, or whether any moneys have been realized, or payments made under the said trust deed to the plaintiffs, or whether the plaintiffs realized thereby the said debt of the said L., or accepted the said trusts in satisfaction thereof, or whether anything passed to the said trustees under the said trust deed, or whether the plaintiffs executed the said trust deed for or in respect of the same indebtedness of the said L., for the security of which the plaintiffs retained the defendants, as in the first count alleged; and because, if the said sixth plea contain any defence to the said first count, it amounts to not guilty, and should have been so pleaded.

Demurrer to the eighth plea also, on the same grounds.

The plaintiffs demurred also to the tenth plea, assigning various causes of demurrer.

The defendants joined in demurrer, and gave notice of exceptions to the declaration—that no cause of action is described in the first count; that from the facts there declared on no legal liability such as is therein alleged arose; that for all that is therein stated, the defendants gratuitously engaged to do what is therein alleged, and that such count is so ambiguous and uncertain that it is impossible to ascertain from it what is the breach of duty with which the defendants are charged, or the damage that the plaintiffs have sustained: and that consistently therewith the plaintiffs may have sustained no damage: that it is not alleged that a confession of judgment is a security which would give to the plaintiffs a priority over other creditors, and that such at all events is not its legal effect, nor is it shewn that the said L. was after such retainer willing to give such confession, or that he became unable to meet his engagements, and that the plaintiffs were by reason of the want of such confession of judgment deprived of any priority: that the plaintiffs in such count should have stated facts, from which the court might have seen whether the injury charged resulted from the neglect of the defendants, and which might have been traversed by the defendants; and that such count is too vague and general for the plaintiffs to recover upon-and should, if the facts be so, have shewn how, by whom, or in what manner they are deprived of a priority which it is alleged such confession would have given them. Also, that the second and third counts are insufficient for the same reasons; and because it is not shewn in the said third count that the confession therein mentioned was due, or that the time allowed thereby for entering judgment thereon had arrived at the time of the commencement of this suit, or that the defendants were retained to enter such judgment, or issue execution thereon; and that the fourth count is insufficient for the reasons alleged against the first count.

Connor, Q.C., for the plaintiffs, cited, in support of the declaration, Bourne v. Diggles, 2 Ch. 311; Dartnall v. Howard, 4 B. & C. 345; Whitehead v. Greetham, 2 Bing. 464; Randell

v. Wheble, 10 A. & E. 719; Elsee v. Gatward, 5 T. R. 143; Brown v. Jarvis, 1 M. & W. 713; Williams v. Mostyn, 4 M. & W. 150.

Read, contra, cited 2 Saund. 150 d, note a; Seymour v. Maddox, 16 Q. B. 330; Searson v. Small, 5 U. C. R. 259; Bevins v. Hulme, 15 M. & W. 88; Lee v. Ayrton, Pea. N. P. C. 161.

ROBINSON, C.J.—I am of opinion that the sixth and eighth pleas are good; they both contain the averment, that before any default made by the defendants; that is, before they had been guilty of any negligence in not taking a cognovit; the plaintiffs of their own accord, and without the consent of the defendants, made an arrangement in common with other creditors of Land, whereby all lands, effects, real and personal (every thing in short that an execution could have reached, besides all the debts that were due to him) were assigned to one of these plaintiffs and another person, to be disposed of, and the proceeds applied to paying all the creditors who concurred in that arrangement. This the plaintiffs do not deny, but they insist that it is no answer to the action. I think it is a conclusive answer, for after that the plaintiffs were not in a situation to insist on a confession of judgment being given to them, in order that they might, if they could, defeat this assignment, and procure payment for their debt before and in preference to others. That would be defeating the assignment to which they were parties, and they cannot complain of it as an injury that that course is not in their power.

The tenth plea, I think, is clearly bad; in fact it is scarcely intelligible.

Some exceptions have been taken to the declaration, but I think it is sufficient in substance.

DRAPER, J.—I think the allegation in the first count sufficient to establish that the defendants were employed as attorneys; then the count states that the plaintiffs retained them to procure a confession of judgment from Land, so as to secure the plaintiffs their debt, and priority over other creditors; that the defendants accepted and entered upon the

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retainer; yet the defendants, not regarding their duty on their retainer, although a reasonable time had elapsed before the commencement of this suit, did not use due diligence in procuring said confession, but wholly neglected and omitted so to do, and so negligently conducted themselves as such attorneys, that by reason of their want of due endeavours, all benefit and advantage of the priority which L. was willing to give the plaintiffs was wholly lost to the plaintiffs. It appears to me that the facts here stated are sufficient for the inference of that duty a breach of which is charged. The defendants are stated to be attorneys-to be retained as such to do a particular act within the scope of their profession—to have undertaken to perform it, and to have neglected to do so within a reasonable time, to the plaintiffs' damage. The employment of the defendants as attorneys raised the duty, though there is no statement that they were to receive fees and reward-Bourne v. Diggles (2 Chitty 311.)

The second count is more questionable, for it does not state that the defendants were retained as such attorneys, while it omits, as the first count omits, any statement respecting fees and reward. It avers that the plaintiffs had retained the defendants, who were in partnership as attorneys of B. R. & C. P., and practising therein as such attorneys. This is more like Dartnall v. Howard (4 B. & C. 345). I think this count is also good.

The third count is, I think, good on general demurrer, and so is the fourth. It is averred in each that the defendants were retained as attorneys for fees and reward.

Bevins v. Hulme (15 M. & W. 88) is distinguishable, and the objection was taken on special demurrer.

As to the pleas demurred to, I think the tenth bad, and indeed it was not very strenuously supported by Mr. Read on the argument. The other two appear to me sustainable, though not free from difficulty.

Burns, J. concurred.

Judgment for defendants on demurrer to the sixth and eighth pleas; and for plaintiffs on demurrer to the tenth.

Adam Henry Wallbridge v. James Becket, Edwin Perry Russell, and Alfred Barnum Russell.

Appeal from C. C.—Illegality—Lotteries—Gambling—Pleading.

Assumpsit on a promissory note made by A. payable to B., endorsed by B. to C., and by C. to plaintiff. The defendant A. pleaded, fifthly, that the note was given by him to the payee as part of the consideration for the purchase of a lottery ticket, contrary to the statute: and, sixthly, the same defence, with the averment that the plaintiff became the endorsee of the note with full knowledge of the circumstances. Held, reversing the decision of the court below, both pleas bad.

Held, also, that neither the facts proved nor the pleadings in this case (set out in the statement) could support a defence under the statutes against gambling, and therefore that the nonsuit ordered in the court below was

wrong.

Appeal from the County Court of the County of Hastings. Assumpsit on a promissory note for £25, made by the defendant Becket on the 28th of September, 1853, payable three months after date to the defendant Edwin Perry Russell, or order, with interest, endorsed by him to the defendant Alfred Barnum Russell, and by the said Alfred Barnum Russell to the plaintiff.

Fifth plea, by defendant James Becket, that before the making of said note, to wit, on &c., one Edwin Perry Russell did corruptly and against the form of the statute, &c., set up and hold in the town of Belleville a certain lottery of certain goods and chattels, lands and tenements, and did sell and dispose of the tickets of said lottery for £75 each; that he the said Becket, bought and procured of the said Edwin Perry Russell one of the said tickets for \$75, payable in one, two, and three years, in sums of £25 each, for which payments three promissory notes were given by said Becket to said Edwin Perry Russell, of which the note declared on was one; whereby and by force of the statute, the said note was and is void in law.

Sixth plea, setting out the lottery and that the note was given for one of the tickets, as in the fifth plea; and adding the averment, that the plaintiff "became and was the endorsee of the said note" with full knowledge of the circumstances under which it was made and endorsed. The plaintiff demurred to each of these pleas.

The seventh plea stated the lottery, and the giving of the note, &c., as in the other pleas, and alleged that the plaintiff took the note from the said A. B. Russell without value or consideration. The plaintiff replied de injuria.

Edwin Perry Russell was the only witness called for the defence. He proved that he had advertised a sale of certain property, houses, lots, and furniture. The particular share that each was to have was to be determined by lottery. Each person paying £75, by three promissory notes of £25 each, received a ticket which entitled him to a share of the whole property, to be determined by the number of the ticket drawn by him. One of the shares was worth £200, and the lowest was worth £25. The note in question was so given. He sold it to A. B. Russell, who sold it to the plaintiff for value, before it fell due. A nonsuit was moved for on the ground that the note was given for a gambling consideration, and therefore void in the hands of an innocent holder,citing 16 Car. II. ch. 7; 9 Anne, ch. 14; 5 & 6 W. IV. ch. 41. The learned judge overruled this objection, reserving leave to move, and directed a verdict for the plaintiff, which was rendered accordingly.

A rule *nisi* was obtained to enter a nonsuit for defendant Becket pursuant to the leave reserved, which after argument was made absolute. The demurrers were also argued, and judgment given for the defendant.

The plaintiff appealed from this decision, both upon the rule and demurrers.

Wallbridge, for the appeal, cited 10 & 11 W. III. ch. 17, 12 Geo. II. ch. 28; Silver v. Barnes, 8 Scott, 300; O'Conner v. Bradshaw, 5 Ex. 882.

Wilson, Q.C., contra, cited Fisher v. Bridges, 2 E. & B. 118; S. C., in error, 3 E. & B. 642; 42 Geo. III. ch. 119.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the fifth and sixth pleas are insufficient; the fifth, because it does not shew that the alleged illegality was known to the plaintiff, or that he is a holder without having given value. It only sets up an illegal consideration within the knowledge of the maker and payee; and the sixth plea we think is bad, because it does not deny what is averred in the declaration; namely, that the payee endorsed to Alfred B. Russell, who endorsed to the plaintiff, but merely avers that the plaintiff, without notice of the

illegality, became endorsee of the note, without saying from whom he took the note. It stands therefore asserted in the declaration, and not denied by the plea, that Alfred B. Russell was an intermediate endorsee of the note, and for all that is stated in the plea he may have been a bona fide endorsee for value, and without notice of the illegality; and if so, the note would be valid in the hands of the plaintiff to whom he transferred it, notwithstanding the plaintiff may have had notice of the illegality.

The statutes against lotteries do not provide that the securities given for carrying out such transactions shall be void; and therefore innocent holders for value are protected, and any one in whose hands such securities are valid can transfer them, even to persons cognizant of the illegality.

The defendant at the trial urged that he was entitled to succeed on the seventh plea (which was not demurred to, though it is liable to exception as well as the fifth and sixth) or rather he moved for a nonsuit, on the ground that the evidence shewed the note to have been given on a gambling consideration, as alleged in the seventh plea, and therefore void in the hands even of an innocent holder, under the statutes against gambling, which he cited. The evidence did not establish that the plaintiff knew anything of the illegal consideration. The learned judge made absolute the rule for nonsuit, and that judgment of his is also appealed from. But the seventh plea, under which alone any defence on the ground of illegality could be attempted to be supported on the trial, was clearly not proved; on the contrary, it was proved that this plaintiff gave value for the note, and it was not shewn that he knew anything of the illegality; and, besides the nonsuit was moved and ordered upon grounds to which no plea on the record was applicable, and which there was no evidence to aupport; for the statutes against gambling and those against lotteries are quite distinct, and the statutes relied upon had nothing to do with the case.

Judgment below reversed.

REGINA V. DOTY.

Indictment—Perjury—Division Court—Interpleader issue—New trial—13 § 14 Vic. ch. 53, sec. 102.

The clerk of a division court, acting under 13 & 14 Vic. ch. 53, sec. 102, issued an interpleader summons of his own authority, without the bailiff's request. Both parties attended before a barrister appointed by the judge of the court, who was ill, and an order was made. The judge afterwards ordered a new trial, which took place. The defendant was convicted for perjury committed upon that occasion. Held, that both parties having appeared, the proceedings in the first instance could not be considered void for want of a previous application by the bailiff; but Held, also, that it was not competent for the judge to order such new trial, the first order being made final by the statute; and that the conviction was therefore illegal.

CRIMINAL CASE reserved. The defendant was convicted on an indictment for perjury committed before the Judge of the Division Court, on an interpleader issue at London.

At the trial at London, before McLean, J., it appeared in evidence that an attachment had issued from Division Court No. 1., in the county of Middlesex, at the instance of one William Webb against Austin Doty, on which a horse called "Bay Boston" was seized by the bailiff, and delivered into the custody of the clerk of the court. A claim was preferred by Mr. John Monk Graham, asserting an interest in one-half the horse as his property, and the clerk of the court delivered the horse to Graham, on receiving from him security that he should be produced when required to be disposed of on execution. The defendant subsequently returned within the jurisdiction of the Division Court, and gave a confession of judgment for the amount of Webb's debt, on which judgment was entered and execution issued. Before the execution was placed in the bailiff's hands, the clerk of the Court, John C. Meredith, issued an interpleader summons, as he alleged, for his own security, considering that he had authority to do so under the 13 & 14 Vic. ch. 53, sec. 102, (See sec. 7, 16 Vic. ch. 177, amending former act), by which summons the parties were required to appear before the judge of the Division Court on the 29th day of March, to make good their respective claims.

On the 29th of March, the Judge of the Division Court, The Honourable J. E. Small, was ill, and an appointment was made by him of Mr. Scatcherd, barrister-at-law, to act as

judge on the trial of the interpleader issue. On the evidence then adduced, Mr. Scatcherd decided against the claim of John Monk Graham to an interest in the horse, but subsequently he became dissatisfied with his own adjudication, and an application being made to Mr. Small, as judge of the court, for a new trial of that issue, with the concurrence of Mr. Scatcherd, a new trial was ordered to take place on the 26th of April.

On that day, the Judge of the court presiding, directed a jury to be impannelled (considering that he had authority to do so under 13 & 14 Vic. ch. 117) for the trial of the issue, and it became a material question on the trial, whether John Monk Graham had paid to the defendant Doty the sum of two hundred dollars, at Detroit, to enable him to become the owner of one-half of the horse. The defendant was sworn as a witness, though objected to on the ground of interest, and then swore that Graham had no interest whatever in the horse, and that he had not paid him two hundred dollars to become the owner of half of the horse, and that he, Doty, had himself paid Harvey Lewis, the coloured man from whom the horse was got, the two hundred dollars on the purchase of the horse.

The indictment was preferred for perjury in thus swearing on the trial of the interpleader issue before the Judge of the Division Court, and on the trial at the last Middlesex assizes a verdict of guilty was rendered by the jury, on evidence which fully justified such finding. The sentence was suspended, in order that the opinion of this court might be obtained on the following objections taken on the trial by John Wilson, as counsel for the defendant.

- 1. That the whole proceeding by interpleader summons was irregular and extra-judicial, the summons not being issued at the request of the bailiff of the Division Court, and the horse not being in the bailiff's possession in execution, or on an attachment at the time.
- 2. That an adjudication having taken place before Mr. Scatcherd, acting as judge, such adjudication was final, and that being so, no new trial could by law be granted, and therefore also the second trial was irregular and extra-judicial

3. That the trial was not before the judge, who alone has authority to try interpleader questions, but was before a different tribunal, composed of a judge and jury, and the allegations in the indictment, of the oath having been administered, is not sustained, and the adjudication made before the Judge of the Division Court alone.

The defendant was admitted to bail, and entered into recognizance to appear at the next assizes for the county of Middlesex to receive judgment.

DRAPER, J., delivered the judgment of the court.

The language of 13 & 14 Vic. chap. 53, section 102 and of 16 Vic. ch. 177, section 7, as regards the question for our decision, is the same. In substance both enact, that if any claim be made to goods taken in execution or attached under process from a division court, by any person not being the party against whom such proceeding has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, to issue a summons calling before the court, as well as the person issuing such process as the party making such claim, * * * and the judge of the court shall adjudicate on such claims, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such court, and such order shall be final and conclusive between the parties.

I am of opinion, that the clerk ought not, without the application of the bailiff, to have issued the summons; but I do not therefore think the proceedings under it—both the claimant and the creditor appearing and submitting to the jurisdiction—void. The bailiff not being in possession is, I think, immaterial.

I think that an adjudication having been made by a competent authority, was final and conclusive, and that it was not competent for the judge under the 84th section of 13 & 14 Vic ch 53 to grant a new trial.

It follows that, inasmuch as the perjury of which the defendant is convicted was charged to have been committed on the second trial or investigation of the claim preferred to

the horse taken in execution, the conviction ought not to have taken place. The order previously made was final, and being so, the subsequent proceeding was without legal authority.

Conviction quashed.

CONNORS V. THE GREAT WESTERN RAILWAY COMPANY.

Action for running over mare—Material averments—Pleading—Statement of value.

Case, against a railway company for running over and killing plaintiff's mare. The first count alleged that the mare was in the close of one W. by his leave, and that defendants neglected to fence along their line, whereby the mare strayed upon the railway. Defendants pleaded (among other pleas) that W. was not possessed of the close; and that the mare was not there by his leave. Held, that issues taken upon these pleas were material, and necessary to be proved.

The second count averred defendants' possession of their railway, and of the engine thereon, and charged that they so carelessly managed the same that the said engine ran against the plaintiff's mare, and threw the said mare unto and upon the said railway, and injured her so that she died.

mare unto and upon the said railway, and injured her so that she died.

Held bad, on demurrer: 1st. Because no value was stated for the mare.

2nd. Because the count implied that the mare was trespassing on the railway.

APPEAL from the County Court of the United Counties of Wentworth and Halton.

CASE—The first count declared that one W. was possessed of a certain close situate in the city of Hamilton, and the plaintiff was also then lawfully possessed of a certain mare, which mare was then by the leave and license of the said W., depasturing and being in the said close, and the defendants (setting out the passing of the various acts relating to the company-viz.: 4 Wm. IV. ch. 29; 8 Vic. ch. 86; 16 Vic. ch. 99, were the owners and possessed of a certain railway running over certain lands taken and occupied for the purposes of their railway under the said statutes, adjacent to the said close of the said W.; and defendants were also then possessed of certain locomotive steam engines and carriages, by them then used on said railway; and the defendants, by reason of the premises, during all the time aforesaid, of right ought to have erected and maintained sufficient fences upon the line of the route of the said railway; yet defendants, well knowing, &c., but contriving, &c., wrongfully and injuriously, during all the time aforesaid, omitted, neglected, and refused to erect and maintain sufficient fences upon such

line of such railway, by means whereof the plaintiff's mare, then so depasturing in said close of the said W. by the leave and license of said W., strayed from said close unto and upon said railway, and was there run over and killed by the engine, &c.

Second count—That defendants were possessed of a certain other mare, which was then depasturing and being in the city of Hamilton, and defendants were possessed of a certain other railway in the said city, and of a locomotive steam engine and carriages then situate and being upon the said railway in the said city; nevertheless defendants so carelessly, &c., managed the said railway, engine and carriages, that the said locomotive steam engine and carriages, then struck and ran with great force and violence against and upon said mare, and thereby then crushed, wounded and injured said mare, and thereby then cast and threw the said mare unto and upon the said railway and upon the ground, and thereby crushed and injured the said mare so that she died, &c.

Pleas.—To the first count—1. Not guilty.

- 2. Plaintiff not possessed of the mare as alleged.
- 3. That said W. was not possessed of the close, as alleged.
- 4. That the mare was not, by the leave or license of said W., depasturing or being in said close.
- 5. Set out a by-law of the City of Hamilton, making it unlawful to allow cattle to run at large within the city, and alleged that in contravention of such by-law defendants allowed said mare to run at large, and being so at large, she strayed upon the railway and was killed; without this, that the said mare was, at the said time when, &c., by the leave and license of W., depasturing on said close. Issue was taken on all these pleas.

Demurrer to the second count, for the following causes.—
1. That it does not appear by the said second count under what circumstances the mare was placed when injured, or in what locality in the city, or whether the mare was in such a position as would entitle the plaintiff to complain of an injury to her. 2. That it does not shew that the mare was at the time when, &c., lawfully depasturing and being in the said

city, and the said mare might have been, for anything that appears, trespassing on the railway lands, or have been in such a position as would exculpate the defendants from blame. 3. And because the defendants cannot traverse or plead that the said mare was not in a proper or lawful locality or occupation when injured, nor can the by-law pleaded to the first count be pleaded to the said second count, as it is framed. 4. And because the plaintiff complains of an act for which, if the plaintiff were also guilty of negligence, he would not have a remedy: yet he does not show, primâ facie or otherwise, that he is not the originator of the occurrence, or a blameable participator in the wrongful act. 5. And because the said second count is for the reasons aforesaid ambiguous, informal, and uncertain; and because primâ facie, as appears by the said second count, the defendants are not liable, inasmuch as it is stated that the said mare was thrown unto and upon the said railway, and the plaintiff does not show that the mare was on the railway lawfully. 6. And because the value of the said mare is not stated, or that it was of any value.

At the trial at Hamilton, in November 1854, it was proved that the mare belonged to the plaintiff, and was worth about £25; and that she was run over and killed upon the railway, at night, within the city. The witnesses thought that she must have got upon the track from the highway at a crossing.—No other evidence was given.

A nonsuit was moved for, on the ground that it was material to shew that the mare was lawfully in W.'s close, and got thence on the railway by defendants' default, and the third and fourth issues taken upon these facts were not proved. Also, that the defendants were not bound to maintain, and could not by their charter maintain, fences or gates across any highway. The plaintiff refused to take a nonsuit. The by-law mentioned in the fifth plea was then put in for the defence and proved.

The learned judge charged the jury that defendants were entitled to succeed on the third and fourth issues, as they were material, and no evidence given to support them; and also on the last issue, as the mare was unlawfully on the highway against the provisions of the by-law; and that on the second issue the plaintiff was entitled to a verdict.

The jury, however, found generally for the plaintiff on all the issues, and £25 damages.

The plaintiffs, in December term, obtained a rule nisi for a new trial, and in the same term the demurrer was argued.

The learned judge made absolute the rule for a new trial, costs to abide the event; and gave judgment for the defendants upon the demurrer.

The plaintiff appealed from this decision, both upon the rule and demurrer.

Martin, for the appeal, cited, as to the demurrer—Andrews v. Whitehead, 13 East 102; Chitty Plead, I. 392; Croft v. Alison, 4 B. & Al. 590; Williams v. Holland, 10 Bing. 112; Pearson's Chitty Jr. 523. As to the verdict-Parnell v. Great Western R. W. Co., 4 C. P. 517; Renaud v. Great Western R. W. Co., 12 U. C. R. 408; Bradley v. Great Western R. W. Co., 11 U. C. R. 220; Bridge v. The Grand Junction R. W. Co., 3 M. & W. 244; Fawcett v. York and North Midland R. W. Co., 16 Q. B. 610; Ricketts v. East and West India Docks, &c., R. W. Co., 12 C. B. 160; Gillis v. Great Western R. W. Co., 12 U. C. R. 427; Bird v. Holbrook, 4 Bing. 628; Lynch v. Nurdin, 1 Q. B. 37; Davies v. Mann, 10 M. & W. 546; Boozey v. Tolkien, 5 C. B. 476; Lancaster Canal Co. v. Parnaby, 11 A. & E. 263; Hancok v. Southall, 4 D. & R. 202; Mitchell v. Crasweller, 13 C. B. 245; Gladwell v. Steggall, 5 Bing. N. C. 735; Williamson v. Allison, 2 East, 446; Dukes v. Gostling, 1 Bing. N. C. 588, 593; Attorney General v. Clerc, 12 M. & W. 640; Stoddart v. Palmer, 3 B. & C. 5; Gwinnett v. Phillips, 3 T. R. 645; Murly v. McDermott, 8 A. & E. 142.

Adam Crooks, contra.

ROBINSON, C. J.—First, as to the judgment given below upon the demurrer to the second count; we could not properly reverse that judgment, unless we were satisfied that the count oughtto have been sustained against all the objections taken to it. Now, to say nothing of graver objections, the learned judge of the County Court held himself bound to decide in favour of the demurrer, upon the objection which was specially assigned as cause of demurrer, that no value is given in the declaration to the mare; and I apprehend we cannot hold the judg-

ment to be wrong, for it is supported by all that is to be found, I believe, in adjudged cases and in text writers and books of precedents. The cases cited by Mr. Martin as authorities to the contrary do not, when examined, bear upon the point. They are for injuries done for chattels, as in the case of collision between carriages, not where the plaintiff is suing, as in this case, for the value of the chattel, on the ground of its being wholly destroyed or taken from him. Of course such an objection as this would not be sustained in arrest of judgment or on general demurrer; but this is on special demurrer. Even so, there is so little reason for requiring value to be stated that we should have preferred finding the decisions the other way, and if the judge of the county court had refused to uphold the demurrer on that point, we should have been reluctant to reverse his judgment; but having decided, as he appears to me to have done, in accordance with authority, we cannot deprive the other party of the benefit of the judgment which he has obtained by pronouncing it to be wrong.

If this had been the only ground of demurrer, I do not think we could properly have reversed the judgment. It is of little moment therefore to consider the other grounds of objection; but I do not at present consider the second count sustainable in the present shape, for the reasons which were intimated during the argument.

As regards the verdict, the new trial, I think, was rightly ordered. The verdict for the plaintiff on all the issues was clearly wrong, because upon some of them he gave no evidence whatever in support of the statements which were traversed. We do not consider those averments immaterial, but if they even were so, the plaintiff should have demurred to the pleas. Having joined issue upon them, he should have given evidence in support of his averments, and should not have the costs of issue on which he wholly failed; and on the more substantial ground it is clear, in our opinion, that the plaintiff was not entitled to recover upon the facts proved.

We should not therefore reverse the judgment, which grants a new trial to the defendants.

DRAPER, J.—There is no negligence but that which results

from the breach of the alleged duty. The duty is divisible, or rather twofold, though the terms of the statute suggest no distinction; but there is one inevitably arising from the application of the rule given by the statute. It is no more the duty imposed to erect gates, through which cattle may pass on to the railroad from adjoining lands, than it is to fence up highways crossed by the railway, without gates or other modes by which the railway can be approached and used where the railway crosses it. In Renaud v. Great Western Railway Co. (12 U. C. R. 408) the court intimated an opinion that the company should have a fence and gate between their railway and the highway, which is different from their duty in fencing against adjoining lands where there is no obligation to put up gates. It seems then to me that—there being ex necessitates a different mode in which the defendant must obey the direction to fence off the line of railway, accordingly as they have to fence against a highway crossed by their railway or against adjoining lands-it is not immaterial in the declaration to shew, as pointing at the nature of the breach of duty complained of, that the plaintiff never was in a situation requiring from the defendants the duty of fencing against adjoining lands, and that having done so, the plaintiff cannot abandon all such statements as mere surplusage, and the issues taken on them as immaterial. The matter so attempted to be rejected qualifies and limits the general allegations, and points at a cause of action in which the liability of the defendants involves consideration of the plaintiffs mare being lawfully in the adjoining close. No doubt, if they are stricken out, a cause of action may remain, but not the cause which is advanced with the addition of these allegations; therefore they are material, and the plaintiff fails on the first count.

As to the second count, in giving judgment in the Mayor of Reading v. Clark (4 B. & Al. 271), which was an action of assumpsit for 500 quarters of wheat for tolls, the court said "Even in trover and trespass for taking goods, the value is always stated." It was objected on special demurrer that the value of the wheat was not stated, and the court sustained the objection. In cases against a carrier for losing goods,

the value is generally stated; and see 5 Bing. 212; 6 Bing. 743.

This count avers that the plaintiff was possessed of another mare, which was depasturing and being in the city of Hamilton; that the defendants were possessed of a certain other railway, in the city of Hamilton, and of a locomotive steam engine and carriages, then situate and being upon the said railway in the said city: that the defendants so carelessly, unskilfully, and improperly used and managed their railway, locomotive steam engine and carriages, that the locomotive steam engine and carriages ran against and struck against the plaintiff's mare, and crushed and wounded her, and thereby cast and threw the mare into and upon the railway, upon the ground, and thereby injured her so that she died.

Does or does not this statement imply or not that the mare was on the railway?

I think it does, and therefore shews the mare was trespassing on the defendants' railway, and that the count therefore does not contain sufficient to charge the defendants.

Burns, J., concurred.

Appeal dismissed.

During this term, the following gentlemen were called to the bar:—Thomas Clark; Samuel Rowlands; A. Boultbee; Columbus Hopkins Green; Adam Ferrie, Jr.; Alfred Francis Wright; James Doyle; William Marshall Matheson; James Fraser, Jr.; James Boyd Davis; Alexander George Fraser; William Meudell; FitzWilliam Henry Chambers; Maunsell Bowers Jackson; John Robert Jones; James Beaty; Philip Turner Worthington; Robert Cleoburey Stoneman; Robert Sutherland.

MICHAELMAS TERM, 19 VICTORIA.

PRESENT:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J. THE HON. WILLIAM HENRY DRAPER, J.*
THE HON. ROBERT EASTON BURNS, J.

IN THE MATTER OF NESS AND THE MUNICIPALITY OF THE TOWNSHIP OF SALTFLEET.

13 & 14 Vic. ch. 48 sec. 18, subsec. 4—16 Vic. ch. 185, sec. 16—Alteration of school section—Request of freeholders, when necessary.

Held, (Draper, J., dissenting) that the request of the freeholders and householders mentioned in 13 & 14 Vic. ch. 48, sec. 18, subsec. 4, applies only to the union of two or more sections into one; and that the municipality of a township may pass a by-law to bring back exclusively within their own jurisdiction any part which has been united with a school section in another township, and, may alter and arrange the sections within their own township; provided only that all parties affected by such intended alteration shall appear to have been duly notified.

By a resolution of the District Council in 1849, a union school section was formed, consisting of part of what had formerly been section ten in Salt-

By a resolution of the District Council in 1849, a union school section was formed, consisting of part of what had formerly been section ten in Saltfleet and part of section three in Barton. In 1854, a by-law was passed by the municipality of Saltfleet, which defined the limits of section ten, and brought it entirely within Saltfleet, excluding that part of Barton

which had belonged to it.

Held, that a ratepayer of Barton could not object that no notice had been given to those affected in Saltfleet; and, semble, per Robinson, C. J, that no notice was required to those in Barton.

It is not necessary to recite in such by-law that the requisite notice, &c.,

has been given.

Freeman moved to quash a by-law of this municipality, passed on the first April, 1854, intituled "By-law 46, to define school section No. 10."

1. Because it was not passed at the request of a majority of the freeholders or householders in the said school section No. 10, and in school section No. 3, in the township of Barton, which had been united with, and formed a union school section with the first-named section, expressed at a public meeting called by the trustees for that purpose; nor at the

^{*} Mr. Justice Draper sat during this term in the Practice Court.

request of a majority of the freeholders or householders in either of the said sections so forming the said union school section, expressed in like manner.

- 2 Because the by-law was not passed at the request of a majority of the freeholders or householders in school section No. 12, in the township of Saltfleet; which school section, or a portion thereof, is by the said by-law united with the said school section No. 10.
- 3. Because the parties affected by the said by-law were not duly notified thereof, or of the intention to make such alteration.
- 4. Because it is not recited in the by-law that any of the requisites referred to in the above three objections had been complied with.

On the 14th of February, 1849, the Municipal Council of the District of Gore, by their resolution, adopted a recommendation of their standing committee on education, which was as follows:

"Your committee recommend that the prayer of the petition of Elijah Secord and others, of Barton and Saltfleet, be granted, and a new section be formed, to be known as Albionville Union School Section, to be composed of part of No. 3 Section, Barton, and part of No. 10 Saltfleet; viz. lots 1, 2, & 3 in the 5th, 6th, and 7th concessions of Barton; and lots 31, 32, 33, and 34, in the 5th, 6th, and 7th concessions of Saltfleet, the school site to be in the village of Albionville; and that the remaining part of section No. 3 in Barton be annexed to section No. 4, in the same township; viz. lots No. 4, 5, 6, and 7, in the fourth concession, lots 4, 5, and 6 in the 5th concession, and 4, 5, 6, and 7 in the 6th and 7th concessions of the township of Barton respectively.

The by-law which was moved against, and which was passed on the 1st of April, 1854, recited that it was expedient and necessary to establish the limits of school section No. 10; and it enacted that the said school section No. 10 should embrace the following portion included in the metes and bounds of the township of Saltfleet, viz., commencing at the south-east angle of lot No. 24, thence north to the 4th concession, thence west to lot 29, thence south to the 6th con-

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cession, thence west to the township of Barton, thence south to the township of Binbrook, thence east to the place of beginning.

Ness, the applicant, swore that he was a resident freeholder, and one of the school trustees of union school section No. 3 in the township of Barton, and part of No. 10 in the township of Saltfleet, since called section 11 in Saltfleet, (formed by the resolution above-mentioned of the 14th of February, 1849); that said union school section continued unchanged till the passing of the by-law now moved against; that the effect of the by-law is to disunite the said union school section, and to exclude therefrom the school section No. 3 in Barton; that no public meeting of the freeholders or householders in the union school section, or in either of the portions, which consisted of parts of Barton and Saltfleet respectively, for requesting the by-law to be passed, was called by the trustees of the said union school section, or by any other person, before passing the by-law; and that the by-law was not passed at the request of a majority of the freeholders and householders in the said union school section, expressed at any such meeting, nor at the request of a majority of the freeholders or householders of school section No. 3 in Barton, nor of school section No. 11 in Saltfleet; that at a meeting of freeholders and householders of the union school section, called by the trusteees after the passing of the by-law, for the purpose of considering the same, a majority of those present resolved to petition for its repeal, and did so petition, but in vain; that in the belief of the deponent a majority of the freeholders and householders in the said union school section were present at the meeting; and that a majority of the freeholders and householders in school section 3 in Barton have been and are opposed to the by-law; and so also are the majority of the freeholders and householders of the said school section No. 11 in Saltfleet; that the school in the said union section always had been and still was in successful operation, and well attended.

Further, George McGill made oath that he was a resident freeholder in, and one of the school trustees of school section 12, in Saltfleet; that this by-law, uniting a portion of No.

12 with school sections 10 and 11 of Saltfleet, was passed without anyrequest or assent of the freeholders or householders of school section 12, no meeting having been called; and that a great majority of such freeholders and householders were and are unfavourable to it, and desire its repeal; that the school in section 12 is in successful operation and well attended; and that the said school section No. 12 was before the passing of this by-law a portion of a union school section consisting of parts of Binbrook and Saltfleet. The statements in these affidavits were corroborated by other affidavits.

On the other hand, it was sworn by Henry Lutz, a resident freeholder in Saltfleet, and the reeve thereof, that before and at the time of passing the resolution of the district council (in February, 1849), a school section No. 10 existed in Saltfleet, of the same extent as is now provided by the by-law; that by that resolution a small part of school section 10, in Saltfleet, was united with a part of section 63, in Barton, being a small strip or tier of lots, on the west boundary of the township of Saltfleet; that afterwards another small portion was taken from the original school section 10, and united with a school section in Binbrook, and called union section 12; that union section 12 continued till February, 1854, when the Municipality of Binbrook resumed the portion of their township, having by by-law divided Binbrook into six school sections, when that part of said union school section 12 which had so far formed part of section 10 in Saltfleet was broken up, and remained without a school till the Municipality of Saltfleet took steps to re-unite the same with the remaining section 10 by this bylaw; that on the 19th January, 1854, a petition was presented to the Municipality of Saltfleet, signed by fifty-seven resident freeholders and householders, in each of the said sections 10, 11, and 12, so far as the same respects Saltfleet, being more than nine-tenths of the freeholders and householders resident therein as aforesaid, fourteen of the fifty-seven belonging to section 11 residing in Saltfleet; and afterwards another petition was signed by fifteen resident freeholders and householders, one-third of whom resided in that part of section 11 which is in Barton; that a large majority of union school section 11 reside in Saltfleet; and that the deponent knew that when the by-law

was passed, not three persons in that portion of union school section 11 which was in Saltfleet were opposed to it, that the portion of union school section 11 lying in Barton did not, he thought, contain more than twelve freeholders and householders, of whom a majority were and are in favour of the by-law; that after the Municipality of Binbrook separated their portion of union school section 12 from the Saltfleet portion, the resident freeholders and householders of such Saltfleet portion were unable to keep up their school, and petitioned to unite with 11; that section 10, as created by by-law, is nearly a square, having the school house in the centre, built at a cost of £150, under the by-law, and which is now in use; that he was deputy reeve of Saltfleet for 1854, and remembered the receipt of the petitions spoken of from a large majority of the freeholders and householders residing in section 10 and union section 11; and that he was confident, from the petitions, that a large majority of the resident freeholders and householders in union school section 11, as well those in Barton as in Saltfleet, were in favour of the by-law.

The petitions spoken of in this deposition were annexed to it. There was also an affidavit from William B. Stewart, one of the school trustees for the present section 10 as established by the by-law, affirming the statements made by Lutz to be true; and stating that before the by-law was passed he was a freeholder, resident in that part of the present school section 10, then called No. 10; that while the different portions of the said school section 10 were separate from each other, two of the school trustees for that part of the present school section 10, then called section 12, came to him in August, 1850, and asked him to assist them in effecting a union of the then several school sections 10 and 12, representing that they would have difficulty in maintaining a school without such union; that with their consent and that of the other trustees for the then section 10, a school meeting was called for said section 12, to consider of the proposed union; that he attended such school meeting, and there were present between twelve and twenty resident freeholders and householders of section 12, which was a majority; that all present, except one, were in favour of the union, and they passed a resolution to that effect; that immediately afterwards a school meeting was called in the school section 10, for the same purpose; that it was then resolved by a majority of the freeholders and householders in the said then section 10, that it was advisable to unite the then several school sections 10, 11, and 12; the said sections 11 and 12 being respectively parts of union sections formed with Binbrook and Barton, as stated by Mr. Lutz, and it was then resolved to petition for the union. That he knew all the resident freeholders and householders of the then school sections 10, 11, and 12, in Saltfleet, and that the petition to unite the said several sections 10, 11, and 12 in one school section, as they are now united in the present section 10, was signed by every freeholder and householder in the then section 10, except two; by all those in the then school section 12, being part of the union section 12, except one; and by all in the then section 11, being the Saltfleet part of union section 11; that this petition was presented to the Municipal Council of Saltfleet, and the by-law now complained of was then passed, uniting the then sections 10, 11, and 12 in the present section 10; and that, except two or three persons, all the resident freeholders and householders of the present school section 10 were, at the time of passing the by-law, in favour thereof.

There was also filed an affidavit of one Grassie, a school trustee of section 10, in Saltfleet, as composed by the by-law stating that in June, 1854, a school meeting of that portion of union school section 11, situate in Saltfleet was regularly called by the local school superintendent for Saltfleet, at which meeting a majority of the resident freeholders and householders of such portion passed a resolution approving of the by-law now complained of; that he knows the majority of such freeholders and householders then were and still are in favour of this by-law:—and he confirmed all Lutz's statements. So also did Frederick Felker, one of the school trustees for school section 10.

There was also an affidavit of Jonah N. Williams, a resident freeholder of school section 10, in Saltfleet, that on the 18th of January, 1854, he was present at a public school meeting held in section 10, in Saltfleet, called by the trustees thereof;

that he was secretary of the meeting; that a large number were present, and it was resolved that a petition should be taken through the sections, i.e., union section 11, union section 12, and school section 10; and to obtain signatures of the resident freeholders and householders in those sections, asking the Municipality of Saltfleet to unite them and form them into the old section 10; that such a petition was drawn up, and it was the same which was annexed to Lutz's affidavit; that he was satisfied that a majority in the said several sections concurred in the by-law:—and he confirmed all Lutz's statements

It was further shewn that in Saltfleet, on the 17th of February, 1855, the reeves and local superintendents of Binbrook, Barton, and Saltfleet met, pursuant, as was alleged, to previous notice duly given, to consider the settlement of union school sections in these townships; that on hearing all parties and examining the school law, they came unanimously to the conclusion that by the supplementary school act 16 Vic. ch. 185, sec. 17, proviso, the present by-law was authorized, and that they could not set it aside; and they declared the union of school sections 11 and 12 with the townships of Barton and Binbrook to be dissolved, and the portion of Binbrook theretofore in connection with school section 12 in Saltfleet to be united to school section 2 in Binbrook, according to by-law 28 of the township of Binbrook, and the portion of Barton theretofore in connection with school section 11 in Saltfleet to be disposed of as the Municipal Council of Barton might thereafter determine.

Connor, Q. C., shewed cause.

The statutes referred to are noticed in the judgments.

Robinson, C. J.—By the 18th, 40th, and 43rd sections of the original school act, 12 Vic. ch. 83, (not now in force) the provision was that the municipal council of any township, town, or city, might alter any school section of the township, town, or city, or cause a new division of the township, town, or city, into school sections, or unite two or more of such sections: Provided that any alteration of any school section not made with the consent of the trustees of the section should not take effect until three months after notice thereof should have been given in writing to one or more of such trustees.

The 40th section of that act provided for the union, for a particular purpose, of two or more school sections of a township, town, or city, at the request of a majority of the ratable inhabitants; and the 43rd section, enacted that two or more adjoining school sections situated in two or more adjoining townships, might be constituted (for general school purposes) one school section; Provided that the preceding enactments in that statute in respect to such union should have been complied with, (namely, that a majority of the ratable inhabitants shall have applied for the union); and that the municipal councils of the townships in which such sections were situated should have concurred in such union.

There was no other enactment in that first statute, I think, which could affect the union of common school sections for general purposes, except the 18th section above cited.

In the statute 13 & 14, Vic. ch. 48, which repealed 12 Vic. ch. 83, it is provided (section 1) that all school sections or other school divisions already established should continue as they were, until altered, modified, or suspended, according to the provisions of that act. And further, (sec. 18, subsec. 4) that the municipal council of any township may alter any school section already established, and may unite two or more school sections into one, at the request of the majority of the freeholders and householders in each of such sections, expressed at a public meeting called by the trustees for that purpose: Provided, that any alteration in the boundaries of a school section shall not go into effect before the 25th of December next after the time when it shall have been made; nor shall any step be taken towards the alteration of the boundaries of any school section, nor any application be entertained for that purpose, unless it shall clearly appear that all parties affected by such alteration have been duly notified of such intended step or application: Provided also, that union school sections consisting of parts of two or more townships may be formed and altered (under the conditions prescribed in this clause in respect to alterations of other school sections) by the reeves and local superintendents of the townships out of parts of which such sections are proposed to be formed, at a meeting appointed for that purpose by any two of such town reeves,

of which meeting the other party or parties authorized to act with them shall be duly notified.

No other enactment in this statute, which still forms the basis of the common school system, seems to affect the question before us.

In the 16 Vic. ch. 185, sec. 17, this provision is contained: Provided also, that each such township council shall have authority, under the restrictions imposed by law, in regard to the alterations of school sections, to form such part of any union school section as is situated within the limits of its jurisdiction into a distinct school section, or attach it to one or more existing school sections or parts of sections, as such council shall judge expedient.

The statute of 1850 only gives power to the municipal council of any township to make arrangements which shall affect territory wholly within their municipality. They can alter the boundaries of any school section, or unite any two or more sections within their own township; but it is provided, as I have already noticed, that they shall not unite sections except at the request of a majority of the freeholders or householders expressed at a public meeting called by the trustees.

As to union school sections composed of parts of two or more townships, they could, under that act, only be formed or altered by the reeves and local superintendents of the several townships out of parts of which such sections were proposed to be formed; and I infer the intention of the act to be, that the reeves and superintendents were to meet together to discuss and determine upon any such proposal.

I do not feel quite certain whether it was meant by the statute of 1850 that a request from a majority of the free-holders was to precede any alteration of the boundaries of a section, as well as any measure for uniting two or more school sections into one; or whether such previous request from a majority of the rate-payers was only intended to be made a condition of a union of sections within a township. I thought, upon my first view of the act, that the legislature intended to make the previous request of the majority of rate-payers necessary for either purpose; in which case it would necessarily follow, that no union of school sections consisting of parts of

two or more townships could be formed or altered under that act without a previous request of a majority of the free-holders or householders in each of the sections, expressed at a public meeting, after all parties to be affected by such alteration had had due notice of the intended application; but I have concluded, on further consideration, that this view of the statute is not correct, though the intention, it must be admitted, is not plain.

I think that the construction which I have given to the first sentence of the 4th sub-division of the 18th section of statute 13 & 14 Vic. ch. 48, is the natural sense of the words used; and if it be so, it is entitled to prevail. It is the construction most consistent, too, with the clauses which I have cited from the first statute, 12 Vic. ch. 83; and we may easily suppose that the legislature was willing to leave to the decision of the municipal council, after hearing the parties, the arrangements to be made for forming and altering school sections, and the expediency of detaching from other town, ships such portions of their own township as had been united with sections of other townships, and to make arrangements for their distribution within their proper township.

We may suppose also, that the legislature was willing to leave to the town-reeves and superintendents of several townships full discretion, after giving to the inhabitants an opportunity of being heard, of uniting portions of such townships into school sections, without waiting for a previous request from the inhabitants; while on the other hand it might appear to them reasonable not to allow the council of any township to unite two or more sections of the township unless the inhabitants desired it.

Then we have to consider, lastly, the provisions in 16 Vic. ch. 185, sec. 17; and I take the effect of that to be, that the municipal council of each township may detach any part of such township which has been united for school purposes with part of another township, and may either make it an independent school section of their township, or may attach it to one or more existing school sections, or parts of sections, (within their township) as they may think fit. But then they are to exercise this power, the statute says, under the restric-

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tions imposed by law in regard to the alteration of school sections. Now if these restrictions, under the school act of 1850, are not identical with the restrictions which under the same clause are imposed in regard to the union of several sections in a township, (and after the best consideration I can give to that act, I do not take them to be identical), then we are to apply to this case only those restrictions which regard "the alteration of boundaries of a school section," and these are, that the arrangement shall not go into effect until the 25th of December next after the time when it shall have been made; and that all parties affected by such alteration shall be duly notified of such intended step, or of any application for that purpose, before such application shall be entertained.

The statute gives no direction in regard to the notice, as to who shall give it, or what shall be due notice.

The by-law complained of had for its object the disuniting from the township of Barton the school section No. 10 of Saltfleet, or such portion of it as had before been united with a portion of Barton; and this the Municipal Council of Saltfleet could do under the 17th section of 16 Vic. ch. 185, observing (as they are required to do), the same restrictions which are imposed by law—or, in other words, by the statute 13 & 14 Vic. ch. 48, sec. 18, subsec. 4—"in regard to the alteration of school sections." Then what is the want complained of here? The first and second objections turn entirely upon the want of a previous request from a majority of the freeholders or householders—a condition not necessary, as I apprehend, except where the by-law is for uniting two or more sections in a township.

The third objection is expressly that the parties to be affected by the by-law were not duly notified of the intention to make such alteration, and this objection seems to be founded on the assumption that notice was required to be given of the alteration to the inhabitants of Barton, as parties who would be affected by the by-law, as well as to the inhabitants of those parts of Saltfleet which it was intended by the measure to withdraw from the union with Barton; but, although the statute is not quite clear on that point, I think all that is required by it is, to give notice to those who live

in the township for which the municipal council had authority to legislate, and who will be affected by the change which it is proposed to make. That would include all freeholders and householders within those portions of Saltfleet which are to compose section No. 10, as constituted by the by-law; and, for all that is shewn on the part of the applicant, notice may have been given to them.

On the part of the municipality it is shewn, that they were moved to make the alteration by a petition from the free-holders and householders in those parts of Saltfleet which now form the school section No. 10; that by those parties the by-law has been ever since acquiesced in without complaint; and the applicant, Mr. Ness, seems to be a school trustee and ratepayer, not in Saltfleet, but in Barton, at whose instance we ought not to interfere on the ground of want of notice to the inhabitants of Saltfleet. They are the sole judges, and not he, whether the by-law shall be objected to on that ground.

I am of opinion on these grounds, that we ought not to quash the by-law. This conclusion would not be correct if the previous request of a majority of the ratepayers, which the statute 13 & 14 Vic. ch. 48, sec. 18, sub-sec. 4, speaks of, were necessary, under the proper construction of that clause, as well in the case of a by-law for merely altering the boundaries of a school section, as of a by-law for uniting two or more school sections into one; and I repeat that in that respect the act seems to me obscure, but the argument is in favour, I think, of the other construction. The municipal council may "alter any school section already established"this is one distinct object, and so far no restriction is imposed; -"and may unite two cr more school sections into one, at the request of the majority of the freeholders or householders in each of such sections," &c .- this is another distinct object, and is accompaned by a restriction at once expressed, which restriction, it seems to me, does not by grammatical construction obviously extend to the first object of merely altering boundaries, while it seems to be clearly intended to be attached to the object of uniting two or more sections, by the use of the expression, "in each of such sections."

In this statute, and in the subsequent one of 16 Vic. ch.

185, sec. 17, the restriction "in regard to the alteration of school sections" is spoken of as a distinct thing from any other restriction, carefully preserving the very form of expression used in the 18th clause of 13 & 14 Vic. ch. 48, where that object and the other object of uniting school sections are spoken of; and as the power of disuniting parts of different townships which had been united in one school section is (by the 16 Vic. ch. 185, sec. 17,) made "subject to the restrictions imposed by law in regard to the alteration of school sections," this confines the council, I think, to the restrictions which properly belong to that object, if such restrictions are distinct from those which are imposed in regard to the uniting of sections in the same township.

The intention of the 13 & 14 Vic. ch. 48, probably is, that in a measure for merely altering the boundaries of a township the municipal council may take the initiative, and can act without any previous request from a public meeting; but that, if they enter upon such a measure of their own accord, they must see that all parties affected by the alteration have been duly notified of the intended step; and if they have been applied to on the subject of any alteration in the boundaries of a school section, they are not even to entertain the application till they see that such notice has been given.

Taking the 4th subsection of the 18th clause of 13 & 14 Vic. ch. 48, in connection with 16 Vic. ch. 185, sec. 17, the construction which I give the enactments is, that the municipal council of a township may pass a by-law for bringing back exclusively within their own jurisdiction any part of their township which had been before united to a school section in another township, and that they may make what they may think the most convenient arrangement within the township, for giving to the population so brought back the advantage of the common school laws, without their being asked to do so by that portion of the population which lies within the foreign township: But they are not, however, to do this, unless it shall clearly appear to to them that all parties within the township to be affected by such new arrangements have had due notice. It is not required of the council to give the notice, but it is left to them to be satisfied that it has been

given. They are made the judges of the due notice; and we are to presume, in the first instance at least, that it did appear to them that the act had in that respect been complied with. No one from the township of Saltfleet has complained to us that he had not notice, and there is every probability, from the papers before us, that the intention to make the change that has been made was fully known.

As to the fourth objection, that the fact of notice is not recited in the by-law, there is clearly nothing in it. It has been repeatedly decided that there is no necessity for any such recital.

On the whole therefore my opinion is, that the Municipal Council of Saltfleet has rightly construed the 16 Vic. ch. 185, sec. 17, by which it was their intention to govern themselves in making the by-law now moved against, and that the rule therefore should be discharged.

DRAPER, J .- The facts material to be considered lie in a narrow compass. There was a school section No. 10, in the township of Saltfleet. The district council, on the 14th of February, 1849, erected three school sections out of separate parts of this section, combining each part with a part of a school section lying in an adjoining township, and designating each such union school section by a different number-Nos. 10,11, & 12 in the township of Saltfleet. No. 10 was united to part of Barton, and with such part formed union section No. 10. Nos. 11 & 12 were united to portions of the township of Binbrook, and were called by those numbers union school sections in Saltfleet. This state of things existed when the act of 12 Vic. ch. 83 came into force, which act continued all then existing school sections, until altered as thereinafter provided. Then comes the 13 & 14 Vic. ch. 48, which (sec. 18, 4thly) enacts that it shall be the duty of the municipality of each township to alter any school section already established, and "to unite two or more school sections into one, at the request of the majority of the freeholders or householders in each of such sections, expressed at a public meeting called by the trustees for that purpose; with regard to which powers there are several provisoes immediately following, the 5th of

which is, "that union school sections consisting of parts of two or more townships may be formed and altered (under the conditions prescribed in this clause in respect to alterations in other school sections) by the reeves and local superintendent or superintendents of the township out of parts of which such sections are proposed to be formed, at ameeting to be appointed for that purpose by any two of such town-reeves, of which meeting the other party or parties authorized to act with them shall be duly notified." The 17th section of ch. 185 of 16 Vic. concludes with the following proviso, which certainly has but little bearing on the preceding part of the section: "Provided also, that each such township council shall have authority, under the restrictions imposed by law in regard to the alteration of school sections to form such part of any union school section as is situated within the limits of its jurisdiction into a distinct school section, or attach it to one or more existing school sections or parts of sections, as such council shall judge expedient."

I take it this last proviso repeals in fact the 5th proviso above cited from the 13 & 14 Vic. ch. 48, sec. 18, 4thly. Then the question arises, what do the words "under the restrictions imposed by law in regard to the alterations of school sections" mean?—to answer which we must go back to the 13 & 14 Vic., and here the difficulty arises, whether the words "at the request of the majority of the freeholders and householders in each of such sections, expressed at a public meeting called by the trustees for that purpose," refer only to the power immediately preceding—viz.: "to unite two or more school sections into one"—or whether they refer also to the power given "to alter any school section already established."

I cannot discover in the act any reason why the legislature should have required the request of the inhabitants to unite two or more school sections into one, which would not equally apply to the alteration of existing school sections. It must be admitted that the term "to alter" would apparently include every kind of alteration; and that the union of two or more sections into one involves an alteration of each school section so united, so that the introduction of the power to

unite seems not strictly necessary, but rather (unless used pro majore cautelâ) to imply that the latter power is not contained in the former; though if those words had been omitted, it might, as appears to me, have been successfully contended that the power to unite was included in the power to alter. look at the power to alter as the more extensive, and cannot but think it more consonant with the whole spirit of the act to treat the restriction of making the request of the inhabitants a condition precedent to its exercise, as applicable rather to the more general than to the more limited authority. In other words, I infer that a request by the inhabitants must have been intended rather to precede the exercise of the greater power than of the less, because it appears to me to be the policy of the act to refer all merely local questions connected with the school act as much as possible to the inhabitants of the school section to be affected.

Though the power to unite two or more school sections into one is plainly enough expressed, and, as I think, lest it might not be certainly understood as comprehended in the term alter, yet for the purpose of disuniting the power, is either conferred by the term alter or not at all. I have no doubt that it is so conferred ex vi termini; and, if confirmation on this point were needful, it is to be found in the proviso, 5thly, contained in the same subsection, which provides how union school sections of parts of adjoining townships may be "formed and altered." If, however, the power to alter does include a power to disunite two or three sections which have been combined into one, then I must confess I cannot understand the principle upon which the request of the inhabitants of two or more sections is indispensable to their being united, and yet that they may be disunited at the pleasure of the township municipality; for the proviso as to giving notice is no limitation on the exercise of the power to alter; and if that power can be exercised without the previous request of the inhabitants, it can be exercised for every purpose of alteration, except that of uniting school sections.

I do not profess to say certainly why the legislature should, in addition to the request of a majority of the freeholders or householders, to be expressed at a public meeting, have also

required that it shall clearly appear that all parties affected by such alteration have been duly notified, though I am obliged to admit that this is a consequence of the construction I give to the former part of this sub-section. It may be to provide for the possible case of parties being affected by the alteration, who were not freeholders or householders of the section to be altered, and who therefore would have no voice at the public meeting spoken of; or the legislature may have thought it right to guard against a public meeting being suddenly got up without due notice, a majority at which meeting might request changes which a majority of the freeholders or householders of the section would disapprove of, but from want of notice could not express that opinion. But I do not feel this to be so great an objection-so inconsistent with the general spirit of the act—as to hold that the request of a majority of the freeholders or householders is a condition precedent to the uniting school sections, and yet that every other kind of alteration of school sections involving a disunion of sections united can be effected without such request, upon its being made to appear that due notice has been given to all parties interested.

Of the two constructions, I prefer holding the request to be necessary in all cases of alteration, because I think it more consistent with other provisions of the act requiring reference to a public meeting of the freeholders and householders (a); and I would rather do some violence to a strictly literal or grammatical construction of the sentence, than by adhering to it introduce what appears to me would be an inconsistency, if not a contradiction to its spirit. And I do not feel there is, after all, any great violence done to the language of the act, in holding that the legislature have in all cases required two conditions to the exercise of the power given, instead of holding that the more important condition is applicable to the lesser power, and the less restrictive condition to the greater power. I admit that the words not only will bear the construction, but that they seem at least equally adapted to it; but notwithstanding this I think, for the reasons given,

⁽a) See 13 & 14 Vic. ch 48, sec. 5; sec. 6, 2ndly, 3rdly, and 4thly; and sec. 12, 18thly and 7thly; 16 Vic. ch. 23, sec. 3; 16 Vic. ch. 185, sec. 6.

the other is the construction more in accordance with the true spirit of the statute. Nor is this conclusion weakened by the recollection that there have been several applications to restrain what the ratepayers considered an injudicious, if not extravagant, expenditure, by the trustees, when acting without the previous request of the taxable inhabitants.

The by-law moved against has necessarily a two-fold operation. It severs one or more union school sections, and it unites three school sections into one, so far as Saltfleet is concerned. This in my humble judgment strengthens the conclusion at which I have arrived, for under the 13th & 14th Vic. ch. 48, the power of uniting school sections could only be exercised at the request of the freeholders, &c.; and under that act, the moment a severance of a union school section, composed of parts of adjoining townships, had been effected in the manner authorized by that act, so that no portions of the township remained united, the jurisdiction over the severed portions would devolve on the municipality of each township; and, so far as respects uniting such portion to another school section within the same township, that jurisdiction must by exercised, as appears to me, at the request of a majority of the freeholders and householders.

I took this view of the enactment in question, in the case of Morrison and The Municipality of Arthur, decided on the 1st September last (ante, 279). It was not suggested during the discussion of that case that any distinction could be drawn as to the necessity of a previous request between the alteration or union of school sections. I do not mean to set up that decision as entitled to any authority; but since the argument of the case I have carefully and repeatedly considered the question, and am at last confirmed in the soundness of the opinion then expressed. The facts attending that case I think illustrate the reasonableness of the construction. township had been divided into four school sections, the division was altered, and only three sections were created by the by-law complained against. As a consequence, the schoolhouse in one section became unnecessary, as the alteration brought that schoolhouse within the limits of another section having already its schoolhouse. The unnecessary

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schoolhouse was either dismantled or demolished, and the school property therein disposed of by the trustees of the school section within the limits of which it was so brought, and which to make the case intelligible, I will call No. 1. When there were four sections, this had been the schoolhouse of section No. 2. Under the new division No. 2 was composed of the larger part of the previous No. 2 and the previous No. 3. The objection to the by-law was, that the inhabitants of No. 2, as it stood before the alteration, had never requested the change. If this were an alteration-and I think it was not the uniting two or more school sections into one—then, according to the opinion now entertained (as I understand) by a majority of the court, no such request was necessary; and yet the school site, house, or other property could not be disposed of without the sanction of a majority of the freeholders or householders; and again, if the site of the school-house in No. 1, as at first bounded, was convenient, it might cease to be so with its enlarged limits, and a new site for a school-house might be really necessary. Thus, an alteration which would render one school site and schoolhouse useless, and another so inconvenient as to compel a change, may be made by the municipality even against the wish of the inhabitants, while neither could the old sites be disposed of, nor a new one procured, nor the site be changed from one part to another of No. 1, without the authority or consent expressed at a public meeting of the freeholders or householders of that section.

I may condense my views into this brief conclusion: I admit the words of the act will bear two constructions. According to the one, the power to alter and to unite are to be exercised each upon a different condition precedent. According to the other, both conditions are applicable to both powers. One condition is a mere notice to all parties affected; the other is a request of a majority of the free-holders or householders in each section to be affected, to be expressed at a public meeting convened for that purpose. This latter condition is most for the advantage and protection of the ratepayer. According to one construction, this latter condition applies only to the uniting two or more

school sections into one: according to the other, it applies to every alteration of school sections after they are once established. Looking at the instances in which the legislature have made a reference to the freeholders and householders necessary, considering that such alteration may, and probably will, occasion expense to be borne by the ratepayers, (though uniting school sections is less certain to have this effect,) and considering that the machinery of school section management is based on popular election, and mainly subjected to popular control by the parties interested, I think it most consistent with the spirit and general scope of the act to hold, that the request of a majority of such freeholders or householders in a condition precedent to any alteration of school sections by the tewnship municipality. It is made the duty of every such municipality to divide the township into school sections, without any condition, because the legislature designs the application of the common school system to every township which has, or is under the government of, a municipality; but when this is accomplished, all details of merely local interest or management are referred as much as possible to the parties to be affected by them, and treating them as the plain policy of the common school acts. I apprehend it should be looked to as pointing out the true construction of that part of the acts now in question.

I think, consequently, this by-law should be quashed.

Burns, J.—The power which the reeves and local superintendents had, under the 4th sub-section of sec. 18 of 13 & 14 Vic. ch. 48, of forming and altering union school sections, where formed out of two or more townships, was transferred to the municipal council of the township by 15 Vic. ch. 185, s. 17. Previous to this latter provision, the joint actions of the different townships was required through the reeves of each, united with the local superintendent; but now the municipal council of each township is declared to have authority to deal with that part of the union school section which is situate within the limits of its jurisdiction, under the restrictions imposed by law in regard to the alterations of school sections, as such council shall deem expedient. The question in this case is,

whether the Municipal Council of Saltfleet can make a by-law affecting that part of Saltfleet which is within its jurisdiction, without first being requested to do so by the inhabitants of the part of Barton which was united to part of Saltfleet for the purpose of the school section.

This depends upon the proper construction to be given to the fourth subsection of section 18, of the statute of 1850. I had recently to consider the provisions of the sections in the case of Morrison and the Municipal Council of the Township of Arthur, in which case the township council remodelled the sections within the township, without being previously requested so to do. I was then of opinion that this could only be done upon the council being requested by the majority of the inhabitants; and for some time, in discussing this case, I entertained the same opinion. In the case now before us a new provision must be considered, which did not enter into the former; and that is, the effect of the 17th section of 16 Vic. ch. 185. If in the case of a union school section formed from different townships it is necessary to have the majority of the inhabitants of the section so formed first to request an alteration, it may be asked which township council is to take the initiative, or is it necessary that both councils must act? They cannot act jointly; and must the majority of the inhabitants ask each to act severally, or, if one can do it, which must be the one to act? The provisions of the section are that each such township council shall have authority, in regard to such part of the union as is situate within the limits of its jurisdiction.

The question is, whether that jurisdiction can be exercised without the council being first requested to do it, and whether in fact it is necessary, in any case of alteration of boundaries of sections, that a meeting should be called of the inhabitants, in order that a majority may request the alteration. If it can be done by the council without such request, then it is quite clear what the legislature intended, when the power of altering union school sections formed from different townships was transferred from the reeves of each and the local superintendent to the council of each township; but if each council is still limited to have its power invoked by the

inhabitants, then I do not see my way to give a construction to the 17th section of 16 Vic. ch. 185, which can effect an alteration, as in this present case, other than to hold, not only that a majority of the inhabitants of the section composed of different townships should first request it, but that, to avoid all difficulty in the matter, each township council must pass a by-law in order to make it effectual.

This it does not appear to me was intended; and therefore this case requires that an examination should be gone into, whether in truth the opinion I formerly entertained as to the construction of section 18 of 13 & 14 Vic. ch. 48 was correct. If that view be correct, I see many inconsistencies which must be the result in a case like the present, besides the difficulty of harmonizing the different provisions. And if that view be incorrect, and it be true that the council has the power of altering the school sections of the township without first being requested to do it, then the whole system seems to me to harmonize together.

It is certainly true that no power or authority exists to dissolve a union of school sections, or parts of different townships united, unless that authority be conferred under the word alter; and it is equally true that in case of the municipal council having authority to deal with that part of the school section within its jurisdiction, without the assent of that portion of its inhabitants without the jurisdiction, may leave those persons without remedy in regard to the schoolhouse in respect of which they may have been called upon to pay for its erection. The latter difficulty is no doubt a serious one; but it may be that the legislature supposed, when the authority was given to the municipal council of the township, instead of the reeves of each with the local superintendent, that the council would not act so unjustly to those inhabitants who would be left without the schoolhouse, as not to compensate them for it.

There is a provision that the inhabitants transferred from one school section to another shall be entitled to such a proportion of the proceeds of the disposal of the schoolhouse as the assessed value of their property bears to that of the other inhabitants of the school section from which they shall have been separated. If disposal means sale of the schoolhouse, then the inhabitants of a school section, the whole of which is within the jurisdiction of the municipal council, which have been separated from those inhabitants who retain the schoolhouse for their own purposes instead of being disposed of by sale, are equally without remedy with those inhabitants who may be in a different township. On the other hand, if disposal by sale or otherwise can be construed to mean that the portion of the section which shall retain the schoolhouse shall compensate the others as the assessed value of their property bears in proportion to the others, then I see no more difficulty in the case of a union school section of different townships than in the case of one in the same township. Should it be that the people of Barton are left without remedy in respect of the schoolhouse, I do not think that affords an argument in favour of a construction of the other part of the section in favour of the inhabitants being the persons first to request the municipal council to alter the second section. All we can say is, that as in the case of the same thing occurring within the limits of the township, it is a casus I have no doubt the word alter must be held to omissus. confer the power of dissolving the union of school sections, as well as merely altering the boundaries of a sections, and therefore it must be held to be the major proposition in the section.

The question then comes to this, whether in all cases of altering and dissolving school sections as well as uniting school sections, the council must first be requested to do so by a majority of the freeholders or householders, expressed at a public meeting called by the trustees for that purpose. I was, as I have said, much inclined to think so, on the ground that the tenor of the act seemed to point at matters connected with schools being first to proceed from the inhabitants of the different sections. Notwithstanding that it might be uniform and convenient in sections within the same township to put such a construction upon the act, yet I think now it is not consistent with the words or different provisions of the fourth sub-section to do so. The grammatical construction of the first sentence is, that the union of school sections shall only take place at the request

of the freeholders or householders in each of such sections, leaving the alterations to be made upon the authority of the municipal council without such request. Though from what I have said before this might be construed to embrace the alteration of a school section as well as a union of school sections, yet what follows seems to me to prevent that construction. The first proviso following the sentence clearly relates to union of school sections, and the whole of the second proviso as clearly relates to the alteration of sections. The third and fourth proviso relates, as they are expressed, to both.

We have the legislature, therefore, using words and expressions clearly shewing that both subjects were contemplated, and that it was not considered the one class was embraced in the other class. The provisions of the second proviso seem to me to shew that the alteration of a school section stood upon a different footing from that of union school sections. If an alteration could only be made upon a request of a majority of the inhabitants, it may be asked what necessity was there for enacting that no step should be taken, or any application entertained for an alteration, unless it should clearly appear that all parties affected had been duly notified. This provision would be in addition to a meeting to be called by the trustees to obtain the request of the majority of the inhabitants. Now it is very clear this provision does not extend to a union of school sections; and therefore, if it shall be held that a meeting must be held, and a majority of the inhabitants must first request an alteration, then the power to alter stands upon a footing more stringent than the power to unite.

It seems to me that the legislature contemplated the two classes as being differently situated. After every consideration I can give the subject, it seems to me the true construction is, that the municipal council of the township shall have power and authority to alter school sections, but before any step shall be taken, or the application entertained for the purpose, it shall appear that all parties have been notified; but in case of school sections desiring to unite, the municipal council must be first requested by a majority the inhabitants of each section to do it.

A union of two or more sections is an alteration, no doubt, but when such an alteration as that is desired, inasmuch as such alterations do not interfere with boundaries, and such alteration may be for the convenience of such sections alone. the legislature supposed the alteration by a union of sections should only take place upon the request of the inhabitants of each of the sections. If that rule prevailed in the alteration of the boundaries of sections, then it might prevent the council from remodelling the sections of the township when the population became such as to require it, in case some one school section did not desire an alteration. There can be no doubt that the council would possess the power to make and erect schools sections in a township, or part of a township, where none had existed before. The question in such case would be, after once having made and erected sections, whether the council any longer retained power to alter the boundaries so first established, without first being requested to do so by a majority of each of the sections to be affected by the alteration. The difference in the increase of population of different places might render it desirable that a change should take place, and the boundaries should be recast. The second provisio in the section of the act meets such a case, or, indeed, any case of alteration, whether of two school sections or the whole school sections of the township; whereas, if it be held that no alteration can take place without the consent of the majority of the inhabitants in each section, then, should it become desirable to recast all the sections of the township, it would be in the power of any one school section to thwart all the others. I think it more reasonable to hold that the legislature have vested the power of alteration, under the restrictions contained in the second proviso, in the council, than to suppose that when the council has once erected a school section all power of alteration of it has passed from that body, until it shall again be requested to assume it by a majority of the inhabitants of the section. Under the 16 Vic. ch. 185, I am of opinion the council of each township has power to take back that part of the township which has been united to a part of another township, for the purpose of recasting its

own boundaries, without the consent of the inhabitants of that part of the section which would be in another township; and therefore the by-law of the township of Saltfleet should be upheld.

Rule discharged—Draper, J., dissenting.

IN THE MATTER OF LEY AND THE MUNICIPALITY OF THE TOWNSHIP OF CLARKE.

Alterations of school sections within a township and of union school sections.

Under 13 & 14 Vic. ch, 48, sec. 18, sub-sec. 4, the municipality may alter the boundaries of school sections within their townships, by taking from one and adding to another, without any previous request of the free-holders or householders, and notwithstanding their disapprobation of the change, provided that those affected by the alteration have notice of the intention to make it.

But they have no power to alter the boundaries of a union school section,

consisting of parts of different townships.

Wilson, Q. C., obtained a rule on the Municipality of Clarke, to shew cause why the by-law of the municipality No. 60, for the extension of the limits of the union school section No. 22, should not be quashed:

- 1. Because it was passed illegally, there being no request of the majority of the freeholders and householders of the section altered by the by-law, expressed at a public meeting called by the trustees, as required by the statute 13 & 14 Vic. ch. 48, sec. 18, sub-section 4.
- 2. Because all the parties affected by the alteration were not duly notified of the passing or intended passing of the by-law.
- 3. Because the municipality had no power to pass the said by-law, or to alter the limits of the union school section No. 22.

The by-law was passed on the 23rd of December, 1853. It enacted, that from and after the passing of the by-law lot 30, in the 6th concession of Clarke, should be added to and form part of union school section No. 22.

C. Robinson shewed cause.

The facts are fully stated in the judgment.

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ROBINSON, C. J., delivered the judgment of the court.

It is very clearly shewn by the affidavits, which are carefully prepared, that the Municipality of Clarke took upon themselves, without the request or consent of the freeholders and householders, to alter, by the by-law complained of, the limits of the school sections Nos. 22 and 12, in Clarke, by taking from the latter a portion of a lot of land which had formerly belonged to it, and by making the whole of that lot (30, in the 6th concession of Clarke), a part of the section 22, whereas, by the arrangement before established, a part only of the lot 30 was united to that section.

The evidence furnished by the affidavits is quite clear as to the nature of the alteration, and that it was made not only without any request of the freeholders and householders of the sections 12 and 22, but contrary to their wish as expressed at a public meeting; and the application to quash the by-law is made by a ratepayer and freeholder residing in school section 12, from which a portion is taken by this by-law and added to section 22.

As I understand the affidavits, school section 22 is wholly in Clarke, and has been united with school section 2 in Darlington. And the by-law (60) complained of, passed by the Municipal Council of Clarke, takes away part of lot 30, in the 6th concession of Clarke, which before formed part of school section 12 in Clarke, and adds it to school section 22 in Clarke, forming with 2 in Darlington a united school section.

The affidavits seem to me to be inaccurate in one respect. They state repeatedly that the by-law converts No. 6 into a school section, and unites it with 22. It does no such thing that I can make out, but merely in effect takes part of lot 6 from section 12 and adds it to section 22, the lot and both the sections being wholly in Clarke.

If the by-law had made 6 a complete school section in itself, and then united it with section 22 of Clarke, it would have been a case of a municipal council uniting two school sections of their township; and such a by-law, to make it legal, would have required, under 13 & 14 Vic. ch. 48, sec. 18, sub-section 4, a previous application to the municipal

council from a majority of the freeholders or householders of sections 12 and 22.

But what has been done is in fact an alteration of the boundaries of school section 12 and 22 in Clarke, and I apprehend that the Municipal Council could make such alteration without any previous request from the ratepayers (a).

But they were bound to see that those to be affected by the alteration had notice of their intention to make it. It is objected that such notice was not given. The applicant, Ley, is one of those affected by the alteration, and therefore entitled to move upon that ground.

But, as to the objection, it is evident on the applicant's own shewing, as well as from affidavits filed on the part of the defendants, that the inhabitants, both of 12 and 22, had notice, for they met and discussed the proposition before the by-law was passed, and they sent to the Municipal Council notice of their disapproval. They have, therefore, no reason for objecting a want of notice.

They evidently mean to contend that the Municipal Council could not pass the by-law in opposition to their will; but the statute does not seem to us to countenance such a position. Sections in a township cannot be united without the previous request of the inhabitants; but an alteration in the boundaries of a section or of two sections, by taking a piece of one and adding it to another, can be made by the council without such request, though not without its appearing that those to be affected by the change have had notice. If they have had such notice, as it appears they had in this case, their disapproving of the change does not disable the Municipal Council from carrying it into effect, if, after hearing the objections, they should think it expedient to do so.

It is further objected, however, that the Municipal Council had not the power of altering the boundaries of a union school section, which they did in effect when they made the Clarke section 22 larger than it was before, because this necessarily added so much to the union section.

This objection, it appears to us, is entitled to prevail, for

⁽a) See the preceding case, Ness and The Municipality of Saltfleet,

under the latter part of the 18th clause, it is to the reeves and local superintendents of the two townships that the jurisdiction is given to form or alter union school sections consisting of parts of different townships, and the township councils of either township are precluded from exercising a power of that kind.

We are of opinion that on this ground the by-law is illegal, as having been made by an authority not competent to make it, and must on that account be quashed.

Rule absolute.

REGINA V. O'BRIEN.

Sacrilege-4 & 5 Vic. ch. 25, sec. 13; ch. 24, sec. 43-18 Vic. ch. 92.

An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishioners of the said church." Held bad.—They must be averred to belong to some person or persons individually. Such a defect is not within the 18 Vic. ch. 92, secs. 25 and 26.

CRIMINAL CASE, reserved by *Draper*, J., at the assizes for the County of Ontario, in the autumn of 1855.

The indictment charged the prisoner with breaking into a Roman Catholic Church in the township of Brock, and sacrilegiously stealing vestments and other chattels, which in the indictment were described as the goods and chattels of the parishioners of the said church, no individuals being named as owners.

No objection was taken on the part of the prisoner, but it appeared doubtful to the learned judge whether the indictment was sufficient; and he therefore abstained from passing sentence, and reserved the case for the consideration of this court, leaving the prisoner in custody.

The Solicitor General, for the Crown, cited Rex v. Richardson, 6 C. & P. 335; Rex v. Nixon, 7 C. & P. 442; Rex v. Boulton, 5 C. & P. 537.—The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court. With regard to the offence, our statute 4 & 5 Vic. ch. 25,

sec. 13, is an exact transcript of the Imperial act 7 & 8 Geo. IV. ch. 29, sec. 10, except as regards the punishment assigned to the offence.

The only provision that I can find in our statute book which affects the form of the indictment in such a case, is that in 4 & 5 Vic. ch. 24, sec. 43, which provides "that in any indictment for any felony or misdemeanor committed in, upon, or with respect to any church, chapel, or place of religious worship, or to any bridge, court, court house," &c., " or on or with respect to any materials, goods, or chattels, whatsoever, provided for or at the expense of the province, or of any division or sub-division thereof, to be used for making, altering, or repairing any bridge or highway, or any other such building, canal, lock, drain," &c., or to be used in or with any such court or other building, canal," &c., "it shall not be necessary to state such church, chapel, or place of religious worship, or such bridge, court, court house," &c., "or such canal, lock," &c., "or any such materials, goods, or chattels, to be the property of any person."

If this provision extends to goods stolen in a church or chapel, then we are of opinion that charging them to have been the goods and chattels of the parishioners, when they need not have been stated to have been anybody's goods, would not vitiate the indictment, for it could be treated as mere redundancy.

The question is, whether the clause dispenses with the necessity of averring that goods stolen in a church, chapel, &c., were the goods of any person.

The stealing the vestments, &c., in this case, was a felony committed in a church, and so is within the first part of the clause, one consequence of which is clear—namely, that the church itself in which the offence was committed need not be stated in the indictment to be the church of any person; but certainly, according to the grammatical construction of the clause, the necessity for averring the goods stolen in the church to have been the property of some person is not dispensed with, because the enactment as regards stating the property in the goods is contained only in the last two lines of the clause, and is limited to such materials, goods, or chattels, as had been

before spoken of in the clause—namely, materials, goods, or chattels, provided for, or at the expense of, the province, or of any division thereof, to be used for certain public purposes that are enumerated, none of which has any relation to a church or chapel, or place of religious worship.

We can have no doubt of what the legislature meant, but so little latitude of construction is assumed in criminal cases, that if such a question arose in regard to any enactment creating an offence or assigning a severer punishment, we should have no doubt that we could not properly extend the words, or give a forced construction to the passage, in order to bring that within the enactment which the language used does not plainly bring within it.

As the question here is not in regard to words creating an offence or imposing a penalty, but in regard to a provision intended to facilitate the administration of justice, by removing occasions of difficulty in regard to matters not essential, we have hesitated on the point whether we ought not to give effect in this case to the obvious meaning of the legislature, though they have not been accurate in expressing it.

We are of opinion, however, that it would be departing from the principles adhered to in administering the criminal law, and that we must, in consequence of the defect in the indictment, hold the conviction to be illegal.

We have considered whether such an objection as this comes properly under the terms of the 25th and 26th sections of 18 Vic. ch. 92, in which case the court would be relieved from the necessity of giving effect to it, or rather of entertaining it upon the suggestion of the judge; and we are of opinion that, so long as there is no statute dispensing with the necessity of stating who was the owner of the property stolen, and while that description of averment is left to stand on the footing on which it has always stood by the common law, it cannot be looked upon as a matter of form, but is a substantial allegation necessary to be made and proved.

There would have been no difficulty in this case in framing the indictment so as to be free from the objection.

Conviction quashed.

COMSTOCK V. BURROWES.

An affidavit of the due taking of evidence under a commission to examine a witness abroad, was entitled in the Common Pleas, instead of the Queen's Bench. *Held*, no objection.

Assumpsit for goods sold, &c. It was an action brought for a small quantity of drugs sent from New York, by the plaintiff to the defendant, who had ordered them, but who, when they arrived, refused to receive them. To prove what the boxes contained, it was necessary to take evidence in New York, under commission.

Upon this testimony, and the vivâ voce evidence given at the trial, at Perth, before Macaulay, C. J., the case seemed to be made out, and the jury gave a verdict for the small sum claimed, £13 8s. 9d.

An objection, however was taken to the affidavit of the due taking of the evidence, which was returned with the commission; namely, that it was entitled in the Common Pleas, whereas the cause was in the Queen's Bench. The learned Chief Justice thought there was nothing fatal in the objection, but reserved leave to move on that ground.

Hagarty, Q. C., obtained a rule nisi accordingly; he cited Doe Park et al v. Henderson, 7 U. C. R. 182; McLeod v. Torrance, 3 U. C. R. 146; Passmore v. Harris, 4 U. C. R. 344; Wilmot v. Wadsworth et al., 10 U. C. R. 594.

Phillpotts shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We have looked at the affidavit and proceedings under the commission, and do not think that the learned Chief Justice was bound to give away to the objection. In the affidavit, the cause depending and the commission are referred to sufficiently to connect the affidavit with the cause, and to shew that the affidavit is entitled in the wrong court, and to shew in what cause it was in fact sworn, and in what court that cause is pending. We must be careful not to exact the same scrupulous regularity in regard to affidavits sworn abroad, as this was, for the purpose of verifying the due taking of evidence abroad, as is required in respect to affidavits made within our jurisdiction for ordinary purposes; for otherwise

a grievous loss might sometimes be thrown upon a party, and evidence obtained in a remote country, after much delay and expense, might be shut out by a technical objection, in which there might be no merit, and which it might be impossible to remedy in time, if at all. We see no other defect or fault in the affidavit.

Rule discharged.

FEEHAN V. HALLINAN.

Breach of contract-Measure of damages.

Assumpsit for breach of contract to deliver cordwood. It appeared that the wood was required for the purpose of burning bricks. The plaintiff proposed to prove that during the delay occasioned by the defendant's neglect to deliver, the price of bricks fell considerably, and he claimed to recover for this loss.

Held, that such evidence was rightly rejected; and that the proper measure of damages was only the difference between the price specified in the contract and that actually paid for the wood procured by the plaintiff elsewhere, together with compensation for his trouble,

SPECIAL ASSUMPSIT, upon a contract to deliver cord-wood within a specified time. *Breach*, that the wood was not delivered in time.

Pleas-Non-assumpsit; and 2. That the contract was rescinded.

At the trial at Toronto, before Robinson, C. J., it appeared that the defendant had broken his contract. The only question raised with respect to the amount of damages the plaintiff ought to recover. It appeared that the wood contracted for was intended to be used for the purpose of burning a quantity of bricks, and the plaintiff offered to prove that he had lost large profits on the bricks in consequence of the delay in procuring wood elsewhere for his intended purpose. The price of bricks fell considerably after the time at which it was said the plaintiff could have sold them if he had received the wood in time. The learned Chief Justice rejected this evidence, and directed the jury that they might estimate the damage by the difference in price between what the plaintiff was to pay the defendant, and that which he had actually paid, together with compensation for trouble in procuring wood elsewhere. A verdict was rendered in accordance with this charge.

Eccles, for the plaintiff, moved for a new trial, for misdirection, and for the rejection of evidence respecting the profits which could have been made on the sale of his bricks; citing Hadley v. Baxendale, 9 Ex. 341.

Burns, J., delivered the judgment of the court.

The direction given to the jury appears to us to be correct. The plaintiff's case shews nothing more than that he dealt with the bricks which he intended to make and burn in the same manner that a merchant would do with goods which he was importing; namely, that he took his chance and incurred the risk of a rising or a falling market. In such case the mere ordinary chances of the market cannot be supposed to have entered into the minds of the parties when the bargain was made for the delivery of the wood. If the fluctuations of the market are to form an ingredient in estimating damages in such a case as the present, then the contract must be special with reference to that. The contract here is not made for bricks, in which case the rise or fall might have had some bearing upon the question; but the contract is for wood to burn the bricks, and therefore the immediate damage is that which is connected with the price of wood at that time. From the case of Hadley v. Baxendale (9 Ex. 341), this principle seems clear, that it is only the immediate injury following the contract broken which is to be compensated for, unless both parties are made acquainted with special circumstances connected with the contract, and the contract can be reasonably understood to be entered into with a view to such special circumstances, expressed or necessarily implied from the knowledge and understanding of the parties. The evidence did not warrant the jury entering into any calculation of consequential damages; and what was proposed to be proved with respect to the fall in the price of bricks, under the circumstances of the case, would obviously have been improper to have received. There should therefore be no rule

Rule refused (a).

⁽a) See Mann v. The General Steam Navigation Company, in the Court of Exchequer, reported since this decision in the Law Times of February 2nd, affirming the same principle. In that case a carrier sent a parcel containing several smaller parcels by defendant's ship, and in consequence of delay in their delivery, he lost the custom of two of his customers who were in the habit of sending parcels by him. It was held that such loss was not the true, legitimate, or probable result of the delay, as reasonably to be anticipated by the parties, and therefore that he was not entitled to recover damages in respect of it.

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CLELAND V. KELLY.

Ejectment-Notice to quit-Acknowledgment of tenancy-Verbal agreement.

EJECTMENT.—Plaintiff claimed under a deed from T. the patentee, dated 12th April, 1853, and proved that on the 4th April, 1854, he served defendant with a notice to give up possession on the 30th September then next, in failure whereof "I shall require you to pay me rent of £1 per month for the same for every month wherein you may continue in possession of the same until I recover possession of the same by legal proceedings or otherwise." Defendant at the time of the deed to the plaintiff, and for some time previous, had been living on the lot, under a verbal agreement with J. that he should have it for several years, and had made improvements. Held, that the plaintiff must recover, that the notice was not an acknowledg-

Weld, that the plaintiff must recover, that the notice was not an acknowledgment of yearly tenancy, so as to entitle defendant to six months' notice;

and that the agreement with T. could have no effect.

EJECTMENT, for part of the south half of No. 48, first concession of Flos, west side of the Penetanguishene road. Defence for the whole.

The cause was tried at Barrie, in September last, before Gwynne, Q. C., acting in the absence of Richards, J. The plaintiff put in letters patent, under the great seal, granting the lot 48, on the Penetanguishene road, in the township of Flos, to James Johnson, in fee, and an indenture dated the 12th of April, 1853, (registered 16th of April, 1853,) from James Johnson and Elizabeth his wife to the plaintiff, conveying to him the south half of the same lot, No. 48, in fee It was admitted that the lot described in the patent was the same as that mentioned in the declaration. He further proved, that on the 4th of April, 1854, he served defendant with a notice to quit and deliver up possession to him on the 30th of September then next, in failure whereof, "I shall require you to pay me rent of one pound per month for the same, for every month wherein you may continue in possession of the same, until I recover possession by legal proceedings, or otherwise." At the time of being served with notice defendant said it would be hard on him, as he was taken in by James Johnson; that he had an agreement with him, under which he was to remain for a number of years.

It was objected, for the defendant, that this notice constituted an acknowledgment that defendant was the plaintiff's tenant from year to year, and consequently was entitled to a half year's notice, which was not given. The objection was overruled. The defendant then proved, that at the time of the sale he was living on the west end of this south half

lot, and had been living there since October, 1850, the other 80 acres of the south half having been, during all that time, and till the sale to the plaintiff, in the possession of James Johnson; that a verbal agreement had been made between defendant and James Johnson; that defendant should have 20 acres for 10 years, to chop and clear, and defendant to pay the taxes for those twenty acres, (which he had paid). The land was then all wild; that Kelly had cleared eleven or twelve acres, or, as his brother stated, close on fifteen acres; and had built a log house and log shed, and had done all this under the agreement with Johnson, under which he first entered.

The jury were directed, that the agreement to hold the twenty acres for ten years, being without writing, was void; and that the notice was not sufficient, in point of law, to make defendant a yearly tenant to plaintiff. They found for the plaintiff, with one shilling damages.

M. C. Cameron obtained a rule nisi to set aside the verdict as being contrary to law and the evidence, and for misdirection, and for a new trial, contending that defendant was a tenant. He cited Knight v. Benett, 3 Bing, 361; Doe dem. Rigge v. Bell, 5 T. R. 472; Doe dem. Cates v. Somerville, 6 B. & C. 126.

ROBINSON, C. J., delivered the judgment of the court. The ruling of *Mr. Gwynne* at Nisi Prius was perfectly correct; and there is no ground for setting aside the verdict.

It may be a hard case on the defendant Kelly, though the hardship is not great if his occupation without rent has compensated him, as it may have done, for having cleared what land he did clear. Johnson does not seem to have acted openly and fairly, either by him or by the plaintiff; though it is probable that the plaintiff, having lived in the neighbourhood, and being well aware of the defendant being in possession, had informed himself of the footing he was upon; and, at any rate, he should, in justice, have ascertained how that was before he concluded his purchase.

On the other hand, we can pay no attention to the alleged verbal agreement set up by the defendant. And as to the

effect of the notice in constituting a tenancy, the cases of Doe dem. Lyster v. Goodwin (1 Dowl. 175,) and Doe dem. Tindal v. Roe (2 Q. B. 143), shew that the ruling at the trial in that respect was right. The latter case is undistinguishable from the present, as regards the terms of the notice.

The case cited by Mr. Cameron, of Doe dem. Cates v. Sommerville (6 B. & C. 126), does not apply, for here there was nothing that could constitute a tenancy from year to year,—no stipulation for rent, and no rent ever paid; nothing but a right that had been given while the land was in the crown, to occupy for many years, upon certain conditions,—the whole of which agreement was void.

Rule discharged.

Ross v. McConaghy and others.

Trespass—Special traverse—Pleading.

Trespass, qu. cl. fr. to lot 1, second concession of Thurlow. Plea, as to so much of the declaration as charges the breaking and entering the S. E. quarter of said lot, liberum tenementum as to that part of the lot. Replication, precludi non, because the trespasses sued for were committed in different parts of the close from that mentioned in the plea; without this, that the close in which, &c., in the declaration mentioned, was the freehold of defendant. Held, on demurrer, replication bad.

TRESPASS, quare clausum fregit, being lot one in the second concession of Thurlow, digging, and taking away gravel, &c.

Fourth plea, as to so much of the declaration as charges defendant with breaking and entering so much of the said close as is known as the south-east quarter of lot 1, in the second concession of Thurlow, that such part of said close was the close, soil, and freehold of the defendant McConaghy, and that the gravel, &c., were respectively part and parcel of said freehold; wherefore defendant McConaghy in his own right, and the other defendants as his servants, obeying his command, committed the trespasses in the introductory part of the plea mentioned.

Replication, that the plaintiff by reason of anything in said plea alleged, ought not to be barred from having or maintaining his aforesaid action, because he says that the trespasses in the declaration complained of, and for which

this action was brought, and each and every one of them, were, at the said several times when, &c., committed by defendants as in the declaration alleged, in other and different parts of the said close in the declaration mentioned from that part mentioned in the introductory part of the fourth plea; without this, that the close in which, &c., in the declaration mentioned, was at the said several times when, &c., or either of them, the close, soil, and freehold of defendant McConaghy, in a manner and form as defendants have above alleged.

Demurrer. The causes assigned sufficiently appear in the judgments.

Wallbridge for the demurrer.

Bell (of Belleville,) contra, cited Robinson v. Raley, 1 Burr. 316; Hedges v. Sandon, 2 T. R. 439; Page v. Hatchett, 8 Q. B. 187; Saund. Pl. and Ev. 295.

Robinson, C. J.—The plea in this case is not, I think, liable to exception. We have only, therefore, to determine whether the replication is sufficient or not. The plaintiff declares for trespasses committed on lot No. 1, in the second concession of Thurlow, not specifying any particular part of the lot, and leaving himself, therefore, at liberty to show a trespass on any part.

The defendant alleges in his plea that what is called the south-east quarter of the lot is his freehold; and limiting his defence in this plea to so much of the whole lot as is known by this name, he sets up that as his justification for any trespass alleged to have been committed in that part. The plaintiff could have had no difficulty in simply traversing that plea, or in now-assigning that he had brought his action for trespasses committed in another part of the lot; and there is no objection, I think, to his doing both in his replication.

But the replication is in this respect objectionable—that it does not notice the circumstance that the plea is pleaded, not in bar of the whole action, but only in bar to any trespass supposed to have been committed on a certain portion of that lot. The plaintiff replies to the plea as if it had been set up as a defence to the whole action, and then asserts, not that he is suing for trespasses committed in other parts of the lot,

as well as in the parts to which the defendant limited his plea, but that he is suing wholly and only for trespasses committed in the other portions of the lot. Then if that be so, he ought not to traverse the plea of *liberum tenementum* in regard to the south-east part; because if all the trespasses he complains of were committed out of that portion of the lot, it cannot be relevant to the action to raise an issue, as he has done by his special traverse, upon the defendant's right to the south-east part.

DRAPER, J.—The fourth plea amounts to this: Defendant says, "As to all the acts of trespass complained of in the declaration, and which were done upon the south-east quarter of lot No. 1, in the second concession, Thurlow, in the declaration mentioned, I justify them because that south-east quarter is my soil, close, and freehold."

The plaintiff replies precludi non, because the trespasses complained of were committed by defendant in other and different parts of the close of plaintiff in the declaration mentioned, from the part mentioned in the fourth plea, i.e., in other parts of lot No. 1, than the south-east quarter—absque hoc, that the close in which, &c., and in the declaration mentioned, was at the said several times when, &c., or either of them, the close, &c., of defendant, in manner and form as the defendant has alleged.

The inducement to this traverse does not amount to any answer to the plea, for the plea justifies a trespass in the south-east quarter of the lot, and leaves the rest of the declaration unanswered; and it can be no answer to this to state that the plaintiff complains of other trespasses, to which the plea does not pretend to apply. Now, so far from this inducement tending to shew that the facts stated in the plea are untrue, it rather eludes and evades, or, it may be said, tacitly admits the facts stated in the plea. This inducement is neither directly nor indirectly a denial of the facts pleaded, and is incongruous with the subsequent traverse, and therefore it seems to me is bad. The case of Coles et al. v. Lovell (15 Jur. 250), reported as Smith et al. v. Lovell in 10 C. B. 6, seems to me to sustain this view. Then the traverse

itself is larger than the plea, for the plea sets up title only to the south-east quarter of the lot, while the traverse is that the close in which, &c., in the said declaration mentioned, i. e., the whole lot, was not the close of defendants modo et forma.—See Goram v. Sweeting (2 Wms., Saunders, 207 a, Note 24 and note m. 6th Ed.)

Burns, J., concurred.

Judgment for defendant on demurrer.

IN THE MATTER OF TILT AND THE MUNICIPALITY OF THE TOWNSHIP OF TORONTO.

Statute labour-Rate of commutation.

Municipal corporations have no authority to fix the term of commutation for statute labour at a higher rate than 2s. 6d. per day.

Dempsey obtained a rule last term upon the Municipality to shew cause why their by-law No. 71, passed on the 2nd of April, 1855, should not be quashed, on the ground that the Municipal Council in passing it exceeded their powers, and that the by-law was therefore illegal.

The by-law was entitled "A by-law to alter and amend by-laws 53 and 62," an it enacted that so much of those by-laws, passed respectively on the 19th of June, 1853, and on the 8th of May, 1854, as related to the sums to be paid in lieu of statute labour, should be repealed. Sec. 2—that the Port Credit and Hurontario Street, and Streetsville Plank Road Companies should have the right to claim, in terms of their charters (in so far as the Municipality may have acquired any control in or over the same) at the rate of five shillings for each day's statute labour that each person should be liable to perform, according to the terms of their respective charters.

3rd. That all persons liable to perform statute labour, under the control of this Municipality, might compound for such duties by paying the overseer for their division five shillings for every day they might be required to work at any time before the 1st day of June, and every overseer was required to accept the same in lieu of such statute labour.

J. Duggan shewed cause.

The municipality maintained their authority to pass the

by-law under the Assessment Consolidation Act 16 Vic. ch. 182, and they shewed that at the present increased price of labour five shillings a day was a very reasonable and low rate, and that labourers could not be hired for less.

ROBINSON, C. J., delivered the judgment of the court.

We see nothing which bears upon the question raised in this case besides the statutes 12 Vic. ch. 81, sec. 31, subsections 27 and 28, and 16 Vic. ch. 182, secs. 36 and 38; and reading these enactments, in connection, we are of opinion that, however low a rate two shillings and sixpence may be for a day's labour at the present time, there is no authority given to the municipal councils to go beyond it in fixing the terms of commutation.

The only effect of the latter statute is, that it leaves to non-resident proprietors no option as to commuting, but provides that they shall commute by paying at the rate of two shillings and sixpence a day, or such other sum as may have been determined by the municipal council as the rate of commutation for residents.

Now the former act authorizes the municipal councils to pass by-laws "for empowering the landholders in any township to compound for the statute labour by them respectively performable, for any term not exceeding five years, at any rate not exceeding two shillings and sixpence for each day's labour." And whether this provision extends to any but residents in the township or not, there can be no doubt it does embrace them, and that as to them no more than two shillings and sixpence can be fixed under that act as the rate for the day's labour; and that being so, the rate of two shillings and sixpence cannot, under the latter statute, be exceeded in respect to non-residents, unless we could hold that the 36th clause of the same statute gives authority to the councils to impose whatever rate they please, and relieves from the restriction contained in the 12th Vic. ch. 81. It does not appear to us that it does, for we think that clause is not to be looked upon as conferring authority at all in this respect; it only refers to what may have been done in any township under the former statute, which it does not, as regards the rate of commutation, profess to alter or repeal.

The words in the 38th clause, or such other sum, must be taken, we think, to mean, as has been argued, any less sum at which the council may have fixed the commutation rate for resident proprietors. That there would otherwise be no limit, is an argument no doubt in favour of this construction, though not a conclusive one, since the legislature has in some instances forborne to limit the power of the municipalities in regard to taxation; we mean, as respects the amount.

We are of opinion that the by-law must be quashed, with

costs.

Rule absolute.

FOSTER ET AL. V. FAREWELL.

Pleading.

Declaration on a promissory note made by one P. payable to F. & F. or order endorsed by them to defendant, and by defendant to plaintiffs. Plea that said F. & F., to whom the note was made payable, and who endorsed to defendant as alleged, are the plaintiffs, and no other persons.

Replication, that at the time of making said note and endorsement by defendant, the maker was indebted to the plaintiffs, and it was thereupon are them that in each of the plaintiffs.

Replication, that at the time of making said note and endorsement by defendant, the maker was indebted to the plaintiffs, and it was thereupon agreed between them, that in consideration that the maker would procure defendant to endorse said note and become surety thereof to the plaintiffs, the plaintiffs would give time to the maker until the note matured; that the note was made in pursuance of such agreement, and defendant, for the accommodation of the maker, endorsed it to the plaintiffs, with the intention of thereby becoming surety to them as endorser; that the maker delivered the note so endorsed to the plaintiffs, who thereupon gave time to him as agreed on, and that the debt remains wholly unpaid.

Held, on demurrer, replication good.

Assumpsit, on a promissory note for £50, made by one George W. Peet, payable "to certain persons therein designated by the names and style of Foster and Fisher" or order, and endorsed by said persons, under such names and style, to the defendant, and by him to the plaintiffs.

Plea—That the said Foster and Fisher, to whom the note was made payable, are the plaintiffs, and no other persons; and the plaintiffs and no other persons are the payees of said note, and the persons to whose order the same was made payable, and the persons who endorsed the same to the defendant, as in the declaration alleged.

Replication—That before and at the time of making the said note, and the endorsement thereof by the defendants, as in the declaration mentioned, the said George W. Peet was

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indebted to the plaintiff in the sum of £50, and thereupon to wit, on the day and year in the declaration first mentioned, it was agreed between the plaintiffs and the said George W. Peet, that in consideration that the said George W. Peet would procure the defendant to endorse the said note, and become surety as endorser to the plaintiffs of the said note. the plaintiffs would give time to the said George W. Peet for the payment of the said debt, until the said note should fall due; that the said George W. Peet thereupon, afterwards, to wit, on, &c., in pursuance and performance of the said agreement, made the said promissory note in the declaration mentioned, and that the defendant, for the accommodation of the said George W. Peet, then endorsed the same to the plaintiffs, with the intent of thereby becoming surety as endorser to the plaintiffs of the said note; and that the said George W. Peet, after the said endorsement by the defendant, to wit, on, &c., in further performance of the said agreement, delivered to the plaintiffs the said note so endorsed by the defendant; that the plaintiffs thereupon, in performance of the said agreement, gave time to the said George W. Peet for the payment of the said debt, until the said note became due; and that no part of the said debt has been paid to the plaintiffs: verification.

Demurrer—that whilst the plaintiffs admit the prior endorsement of the said note, they do not shew any cause to discharge them from liability to the defendant upon said endorsement, and circuity of action is thereby caused; that said replication is a departure from the declaration, in this, that by the declaration the plaintiffs charge the defendant as liable solely upon the said endorsement, whereas the said replication sets up a liability arising from a supposed agreement made previous to the endorsement of the defendant, which agreement varies the cause of action disclosed in the declaration, and should have been declared on in the first instance.

Eccles for the demurrer. Freeman contra. The cases cited are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court. We are of opinion that the plaintiffs are entitled to judgment. Their replication states matter which overcomes the difficulty in the way of their recovery on account of their being parties liable on the note as prior endorsers to the defendant, for they shew that the defendant will have no right of action against them, notwithstanding their relative positions as endorsers.

This replication closely follows the form which has been upheld in England, under similar circumstances, and which has been pronounced not to be a departure from the declaration. The cases of Wilders v. Stevens (15 M. & W. 208), Smith v. Marsack (6 C. B. 486), on which the case in this court of Peck v. Phippon (9 U. C. R. 73), was decided, are upheld in Morris v. Walker (15 Q. B. 589); and the decision in Boulcott v. Woolcott (16 M. & W. 584), which is apparently at variance with Wilders v. Stevens, delivered in the same court, is not treated as an authority to be relied on. Judgment for plaintiff on demurrer.

MELLISH V. VANNORMAN.

Chattel mortgage—Place of registry—Proof of mortgagor's residence.

The description of the mortgagor in a chattel mortgage is at most only prima facie evidence of his residence; and held, that in this case, (upon the evidence stated below,) the jury were warranted in finding that he had changed his residence to the county in which the mortgage was registered, notwithstanding that he had left his family behind him in the county as of which he was described.

TROVER for two horses. Pleas, 1. Not guilty; 2. Plaintiff not possessed.

At the trial at Brantford, before McLean, J., it appeared that the plaintiff claimed under a bill of sale dated 5th January, 1855, executed to him by one Philip Loucks, and duly registered according to the statute 12 Vic. ch. 74, in the county of Brant, in which county it was executed. It was admitted that the defendant had bona fide purchased the horses from, and paid for them to one Smith, of the county of Elgin, who had purchased from Loucks, the person from whom the plaintiff held the bill of sale, and that these several trespasses took place during the last summer. The contest between the parties arose out of the provisions of

the 2nd section of 12 Vic. ch. 74, which enacts that the instruments mentioned in the preceding section shall be filed in the office of the clerk of the district court of the district where the mortgagor therein, if a resident in Upper Canada, shall reside at the time of the execution thereof. Philip Loucks had two sons in Brantford, in the county of Brant, engaged in different kinds of business. One of them engaged in some transactions with the plaintiff and another person, his partner, and the other son had entered into contracts for building houses. Philip Loucks, previous to January, 1855, lived near Vienna in the county of Elgin, but in consequence of the sons at Brantford becoming insolvent he came there to assist them. By an arrangement betweeen the father and the sons, the father assumed their property, and engaged to perform their contracts. He left the other portion of his family residing in the county of Elgin, where they had before resided. When he executed the bill of sale of the horses in question, with other property, to the plaintiff, he was described in the instrument as of the township of Bayham in the county of Elgin. It was proved that after he came to Brantford for the purpose mentioned, he continued there, and entered into contracts himself for erecting buildings there until about April or May, when he and his sons absconded from this country.

The learned judge directed the jury that there was sufficient evidence for them—notwithstanding the mortgagor had previously resided in the county of Elgin, and had left his family behind when he came to Brantford, and was stated in the instrument to be of the county of Elgin—to consider whether he had not in fact changed his residence. He was in possession of the property at Brantford at the time he executed the bill of sale, and was using the horses then and afterwards in the different works he had assumed and contracted to do there. The jury found for the plaintiff, and £68 15s. damages.

VanNorman obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the verdict was contrary to law and evidence, and for misdirection, and for excessive damages, and upon grounds disclosed in affidavits filed. The affidavits were of various persons, stating that during last winter Philip Loucks left his wife and one son upon a farm which he rented in Bayham, and that he was only occasionally at Brantford, looking after and attending to the affairs of his sons there. The son-in-law of Loucks stated in his affidavit that he purchased the horses in question from Loucks in April last for £55, without knowing that the plaintiff had any claim upon them, and he sold them to the defendant, about a week after purchasing, for £50.

Burns shewed cause, and filed affidavits in answer. These affidavits shewed that Daniel Loucks, the son of the mortgagor, had purchased the horses in question from the plaintiff in the early part of the year 1854, but had not paid for them. He also rented seventy acres of land from the plaintiff, upon terms of doing certain work thereon. In the fall of the year he became embarrassed, and his father Philip Loucks came to his assistance, and for two months before he executed the bill of sale he worked with his son upon the leased land, and at his work upon building contracts. informed the plaintiff of his having assumed his son's business and also his property, including the horses in question, and that it was his intention to reside permanently at Brantford. The plaintiff thereupon entered into a new arrangement with Philip Loucks and his sons. It was agreed, on the 4th of January, 1855, that as Philip had assumed the property he should execute a bill of sale by way of mortgage of the horses in question, together with other personal property, to secure a debt of £120 due by Daniel to the plaintiff; also that Philip should further secure the said sum by his promissory note endorsed by the defendant's son named Silas. These securities were given. Danial Loucks gave up the lease of seventy acres of land, and the plaintiff thereupon, on the 4th of January, 1855, executed a lease thereof to Philip Loucks and his son Silas for the term of three years. He remained in Brantford, using the horses there in the different work he was engaged upon till the end of March or the beginning of April, when he absconded, taking the horses with him.

McMichael supported the rule.

Robinson, C. J., delivered the judgment of the court.

We have read the notes of the learned judge who tried the case, and have considered the affidavits filed on each side, and have come to the conclusion that we ought not to set aside the verdict.

The statute requires that the mortgage shall be filed in the office of the clerk of the district court of the district where the mortgagor, if a resident in Upper Canada, shall reside at the time of the execution thereof,—12 Vic. ch. 74.

Since the change made in the arrangements for the division of the province, we have now to look upon county as district. The mortgage in this case was executed in Brant, though the mortgagor is described in it as being of the county of Elgin. That, however, does not shew conclusively that it was registered in the wrong county. The description in the deed can at most furnish prima facie evidence of the residence of the mortgagor; to hold that it was conclusive upon the point, would have the effect of enabling the parties in such cases to evade the statute altogether, by giving a fictitious place of residence.

Then in regard to the evidence given at the trial, it was rightly spoken of by the learned judge at the trial as unsatisfactory and inconclusive upon the point:

The affidavits are plain and direct enough on both sides, but they are absolutely irreconcilable with each other. We see enough now, however, of the facts of the case which are undisputed, to shew us that the intention of the statute was best complied with by registering the mortgage where it was registered; for though the mortgagor, Philip Loucks, seems to have had a wife and one child living in the county of Elgin, he was at the time of the execution of the mortgage so far residing in Brant that he had taken a lease of land there, which he was cultivating, and had been for some time cultivating; and had been for some time actually dwelling there, executing large contracts for buildings, and he was using there the very horses that he had mortgaged, so that if any one was induced to trust him by seeing the horses in his possession, he had an opportunity of acquiring a knowledge of his real interest in them without going out of the county where both he and the property were.

The term "resident," or "resident inhabitant," is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. sense in which it should be used is controlled by reference to the object. The case was not improperly left to the jury, and certainly the justice of the case is so strongly with the plaintiff that we should maintain the verdict, unless it were clearly and absolutely against law, for the horses had been originally his, and were sold to a son of Philip Loucks, who, before he had paid for them to the plaintiff, assigned them to his father, and his father did only what was just when he gave security to the plaintiff upon them for the price. The mortgagor can hardly be looked upon as having a house in Elgin to which he had the "animus revertendi," for when he left Brantford it appears he absconded from the province to the United States.

Rule discharged.

PENTLAND V. BELL AND AITKEN.

Malicious arrest-Application to set off claims.

The plaintiffs recovered judgment against two defendants, one of whom was afterwards arrested under a Ca. Sa. issued on an affidavit made by one of the plaintiffs. This defendant then sued the plaintiff who made the affidavit, and his attorney, and obtained a verdict against them. The attorney applied for himself and his co-defendant to set off this verdict against the judgment.

Held, that the application must be refused, for the attorney having no interest in the judgment, could not claim to have the verdict against himself

paid out of it.

CASE against Bell, as plaintiff's attorney, and Aitken as plaintiff, for a malicious arrest on a writ of Ca. Sa. on a judgment obtained by one Samuel Aitken and this defendant, William Aitken, Junr., against this plaintiff Pentland, and one Bullock.

A verdict was given for the plaintiff, at the last assizes at Cobourg, before *Draper*, J., for £140 damages.

Wilson, Q. C., obtained a rule on the plaintiff, to shew cause why a new trial should not be granted, the verdict as against the said Bell being contrary to law and evidence and the judge's charge.

And also a rule upon the plaintiff to shew cause why the

sum of £140 recovered by him in this case against Bell and William Aitken (the said William Aitken being the same William Aitken mentioned in both cases,) should not be set off against so much of the judgment in the case of Samuel M. Aitken and William Aitken, plaintiffs, and Christopher E. Bullock, and William G. Pentland, defendants, as would be sufficient to satisfy the said £140; or why the said Pentland should not assign his right in the said recovery of £140 to the plaintiffs in the other case mentioned; and why all proceedings in this case, of Pentland v. Bell and Aitken, should not be stayed, if the said £140 be ordered to be set off or assigned, upon the defendants paying the costs in this case.

In support of the application to set off the verdict the defendant Bell made affidavit that in June, 1852, judgment was recovered in the suit of Aitken and Aitken v. Bullock and Pentland, for £386 19s. 4d. damages and costs; that no part of it had been yet paid, but the whole remained due to the plaintiffs in that case; that he, Bell, was and is attorney for the plaintiffs in that case, and under their direction sued out a writ of Ca. Sa., against the defendants, Bullock and Pentland, upon which Pentland was arrested and imprisoned till he was admitted to the limits of the counties of Northumberland and Durham, where he remained in custody upon the said judgment; that the Ca. Sa. above mentioned issued upon an affidavit made by William Aitken, one of the plaintiffs; and that the action of Pentland against William Aitken the younger and the deponent was brought for an alleged malicious arrest of Pentland upon that Ca. Sa., in which action a verdict for £140 was rendered at the last assizes at Cobourg; that the William Aitken the younger, defendant in the action for malicious arrest, is the same William Aitken who was one of the plaintiffs in the action against Pentland and Bullock, and that the deponent Bell was attorney for the said William Aitken, his co-defendant in the action for malicious arrest; that so far as he could in his own right, and as attorney for his said co-defendant, he desired to set off the verdict of £140 recovered against them against so much of the judgment recovered against Pentland as would be sufficient to satisfy the said £140, or to

procure for the judgment plaintiffs in the first judgment an assignment of the said £140, and of all Pentland's right and interest therein from the said Pentland, in order to credit the same against the judgment, so far as the said £140 will be applicable.

VanKoughnet, Q.C., for Pentland, applied for an enlargement of the rule Nisi for setting off the £140 until next term, on the ground, which was supported by affidavit, that he had not been able to communicate with Pentland or his attorney, and obtain affidavits in answer, in time to answer the rule during Michaelmas term, in which it was moved.

It was sworn also that the counsel had been informed that one of the plaintiffs in the suit against Pentland and Bullock objected to such rule being made absolute.

As to the rule Nisi for a new trial, he consented that it should be made absolute on payment of costs.

Wilson, Q.C., contra, did not desire to accept a new trial in case the court should think proper to make absolute the rule for set off; and in support of this rule he cited Hewit v. Pigot, 1 Dowl. 250, 8 Bing. 61; Turner v. Modigliani, 1 H. Bl. 217; Doe v. Darnton, 3 East 149; Mitchell v. Oldfield, 4 T. R. 123; Bristowe v. Needham, 7 M. & Gr. 648; In re Boulton, 1 P. R. 68.

ROBINSON, C. J., delivered the judgment of the court.

This is an application by one of two defendants in one action, who is also attorney for his co-defendant (but without shewing or asserting that he had authority specially given to him by his co-defendant to make such application,) to set off the amount of verdict in such action against a judgment obtained in another action by his co-defendant, as plaintiff, in conjunction with another plaintiff, against the person who is sole plaintiff in this action, but who in the action in which he was defendant was joined with another person as defendant.

It is not pretended that the plaintiff in the first recovery, who is no party to the latter suit—I mean Samuel Aitken—is concurring in this application; and Bullock, who was a defendant in the first action, is no party to the other suit; nor is Bell, who is a defendant in the latter action, any party

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to the first suit. Pentland, the sole plaintiff in the latter suit, has not been heard against the application, or rather has not had time and opportunity to forward affidavits in opposition, and on his behalf an enlargement till next term is pressed, which under the facts stated ought, we think, to be allowed, unless we should think that the rule Nisi must be discharged on what already appears.

The counsel for the plaintiff Pentland assents to the other application, which has been made on behalf of the defendants, for a new trial, so that there need be no difficulty in making that absolute, which would of course put an end to the other application, for there would be no longer a verdict to set off; but the counsel for the defendant Bell, who has moved that rule, desires to abandon it, if the court will grant his other application, as he would rather acquiesce in the verdict, if it can be set off against a judgment which he sees little prospect of having otherwise satisfied, than contest the action for malicious prosecution further.

The courts have granted such applications where the parties in both actions are the same, or substantially the same, though not actually the same. But here Mr. Bell, on whose application alone we are asked to make the order, was no party to the other judgment and has no interest in it. His co-defendant Aitken is the only one clearly who has any pretence for applying, since he alone of the two has any interest in the other judgment. It is in effect an application by Mr. Bell to satisfy Pentland's verdict against him out of a judgment in which he has no interest; and what seems stronger still against this application is, that Mr. Bell is asking expressly on his own account alone to have a verdict against himself in favour of Pentland paid by allowing it to be deducted from a judgment against Pentland in favour of two plaintiffs, one of whom only has any privity with himself in regard to the verdict. The other plaintiff, Samuel Aitken, is not liable to be affected by this verdict, nor bound in any way that we can see to pay it; and though it may be or little or no consequence to him what may be deducted from the judgment against Pentland, who is probably utterly insolvent, yet we cannot deal with his legal rights without his consent.

We are of opinion therefore that we must discharge this rule, and make absolute the rule for a new trial, if it is still desired by the defendants. If we had any idea that it could be right to allow the set off under such circumstances as are shewn, we should still be bound to enlarge the rule Nisi and give Pentland an opportunity to answer it, and Samuel Aitken also. Independently of other grounds of objection, it might, for all we know, be shewn that the judgment against Pentland has been assigned to another party.

Rule absolute for new trial. Rule to set off claims discharged.

STROUD V. KANE.

Trespass—Justification—Lease by defendant to plaintiff—Purchase by defendant of plaintiff's interest at sheriff's sale.

Trespass for breaking and entering plaintiff's house. Defendant pleaded—
2. That the house was not the plaintiff's. 3. As to the breaking and entering, liberum tenementum. 4. As to the expulsion, that the house was the defendant's, and the plaintiff and his family being there unlawfully, he expelled them, using no unnecessary force. Replication, that the defendant had demised the premises to the plaintiff for a term, under which the plaintiff entered, and being so in possession, defendant expelled him. Rejoinder, that the plaintiff's interest in the premises was sold at sheriff's sale under a Fi. Fa. against his goods, and purchased by defendant, and thereupon the sheriff by deed assigned the plaintiff's interest to defendant, and delivered possession of the premises to him; and because the plaintiff was unlawfully there, at the said time when, &c., and refused to leave, defendant ejected him, using no unnecessary force. Held, on demurrer, a good rejoinder.

TRESPASS—First count, for breaking and entering plaintiff's dwelling-house, and ejecting him therefrom. Second count, for breaking and entering the dwelling-house and taking away goods.

Second plea—As to so much of the declaration as charges the defendant with breaking and entering the dwelling-house, &c., of the plaintiff, and making a great noise and disturbance therein, that the said dwelling-house in which, &c., was not, nor was any part thereof, at the said times when, &c., or either of them, nor is it, the dwelling-house of the plaintiff, &c.

Third plea—As to so much of the declaration as charges the defendant with breaking and entering the dwelling-house

of the plaintiff; that the said dwelling-house at the said several times, when, &c., was and now is the dwelling-house of the defendant, wherefore the defendant in his own right, at the said several times when, &c., broke and entered the said dwelling-house in which, &c., and committed therein the said several supposed trespasses in the introductory part of this plea mentioned, using no more force or violence than was necessary for the purpose aforesaid.

Fourth plea—As to so much of the said first count as charges the defendant with ejecting and expelling the plaintiff and his family from the possession and enjoyment of the said dwelling-house, that at the said time when, &c., the said dwelling-house was the dwelling-house of him, the defendant; and because the plaintiff and his family were then unlawfully in the possession of the said dwelling-house, against the will and without the leave or license of the defendant, and refused, when thereto requested by the defendant, to leave and give up possession of the same, he, the defenant, at the said time when, &c., in order to get possession of the said dwelling-house, did necessarily eject and expel the said plaintiff and his family from the said house, as he lawfully might for the cause aforesaid, using no unnecessary force for the purpose aforesaid on the said occasion.

Replication to these pleas-That heretofore, &c., the defendant demised, set, and let unto the said plaintiff the dwellinghouse with the appurtenances, in which, &c., in the said declaration mentioned, from a certain day and year, to wit, &c., to have and to hold the same from the said day and year last aforesaid, for the space of one year thence next following, and so on from year to year, until the tenancy aforesaid should be legally determined by the said defendant, at and under a certain yearly rent, then agreed upon between the said plaintiff and the defendant; that therefrom, and on, to wit, &c., the said plaintiff entered into and became and was possessed of the said dwelling-house, in which, &c., under and by virtue of the said letting, for a long space of time, to wit, from thence until, &c.; and the said plaintiff being so possessed as aforesaid, the said defendant afterwards, to wit, on, &c., entered into and upon the said dwelling-house, with the appurtenances, and then ejected, &c., the plaintiff and his family from aud out of the said dwelling-house, and from the possession thereof, and kept and continued them so ejected, &c., from thence hitherto, in manner and form as the plaintiff hath in his said declaration alleged, and contrary to the promise and agreement so made by the said defendant as aforesaid with the plaintiff.

Rejoinder-That long before the committing of the said supposed trespass in the declaration mentioned, one George Rice had recovered a judgment against the plaintiff in the Court of Common Pleas, at Toronto, and under and by virtue of the said judgment, the same being unreserved and unsatisfied, had caused to be issued a writ of Fi. Fa. out of the said court, to William Botsford Jarvis, then being sheriff of, &c., commanding him that of the goods and chattels of the now plaintiff, in his said counties, he should cause to be made a certain sum therein mentioned, which the said George Rice had lately, in the said court, recovered against the now plaintiff; by virtue of which said writ the said Jarvis, so being sheriff as aforesaid, after the making of the said demise in the said replication mentioned, did seize and take in execution the right, title, and interest of the now plaintiff in the said premises in the declaration mentioned, and did afterwards expose the same for sale; and thereupon the defendant, as the highest bidder at the said sale, became the purchaser of the now plaintiff's right, title, and interest in the said premises; and thereupon, on, &c., before the committing of the said supposed trespass in the declaration mentioned, the said William Botsford Jarvis, as such sheriff as aforesaid, by his certain deed poll, &c. (making profert), did sell and assign to the defendant all the right, title, and interest of the now plaintiff in the said premises, and did then, to wit, on, &c., deliver possession of the said premises to the said defendant; and because the plaintiff and his family, at the said time when, &c., were unlawfully in the said house, against the will and without the consent of the defendant, and refused, when thereto requested by the defendant, to leave the same, he, the defendant, at the same time when, &c., in order to get possession thereof, did necessarily eject and expel the plaintiff and his family from the said dwelling-house, as he lawfully might, for the cause aforesaid, using no unnecessary force for the said purpose on the said occasion.

Demurrer—That the matter stated—namely, that the defendant entered under the said deed—is no justification of the expulsion in the declaration and therein mentioned; that said pleading admits an occupation by the plaintiff and his family, and attempts to justify the expulsion under and by reason of his right to possession obtained by him under the said deed; and it is not alleged that such expulsion was without force, and not in breach of the peace, and that if the defendant, as landlord of the said premises, could not justify the expulsion, he could acquire no greater right, power or authority, under the said deed from the said sheriff; that said rejoinder, admitting force, must shew a legal right to use such force, other than a mere right of possession; and also, for that the plaintiff has not by his replication pleaded a lease in writing.

Dempsey, for the demurrer, cited Taylor v. Cole, 3 T. R. 292; Rex v. Deane, 2 Show. 85.

Van Koughnet, Q. C., contra, cited Newton v. Harland, 1 M. & Gr. 644; Harvey v. Brydges, 14 M. & W. 437.

ROBINSON, C. J., delivered the judgment of the court.

The defendant is entitled, in our opinion, to judgment on this demurrer to his rejoinder. Although he had demised the premises to the plaintiff, who, upon what is stated, would have had a right to continue in possession under that demise at the time of the alleged trespass, provided nothing had taken place in the meantime to deprive him of his right, yet the sale of his interest under the execution, and the purchase of it by the defendant, put an end to his right. The term became merged in the fee, and the plaintiff being the owner of the house, was entitled to the possession of it in the same manner as if no term had been granted.

Then his entry into his own house under such circumstances could not be unlawful, unless it were effected in such a manner as the law will not suffer, whatever may be the right, in which case he would of course be liable to answer for any

offence against the peace which he may have committed; but the mere entry and taking possession was a legal act, and if anything beyond that was done which was illegal, and would afford ground for an action of trespass, the plaintiff should have set forth the excess in answer to the rejoinder, and grounded his action upon that.

The expulsion is only matter of aggravation; if the plaintiff's entry was justifiable, he had a right (using no unnecessary force) to remove any person who was wrongfully in possession of his house. The case of Taylor v. Cole, (3 T. R. 292,) is in point as to the several questions that have been raised in this case; and whatever doubt has been cast upon it by the case of Newton v. Harland (1 M. & Gr. 644,) it is upheld by later decisions, and by a strong current of authority from an early period.

Judgment for defendant on demurrer.

HILL V. LOTT.

Declaration—Promissory note—Action brought too soon.

Declaration—that defendant, on the 9th of March, made his promissory note, and thereby promised to pay to the plaintiffs, six months after the date thereof, which period had elapsed before the commencement of this suit. In the commencement of the declaration the writ was stated to have been issued on the 10th of September.

Held, on demurrer, declaration bad, for the note must be presumed to have

Held, on demurrer, declaration bad, for the note must be presumed to have been dated on the day when it was made, and it appeared therefore that the action had been commenced before the days of grace had expired.

Assumpsit.—The plaintiff declared that the defendant, on the 9th March, 1855, made his promissory note in writing, and thereby promised to pay to the plaintiff £50 six months after the date thereof, which period had elapsed before the commencement of this suit. In the commencement of the declaration the writ was stated to have been issued on the 10th of September, 1855.

Demurrer.—That the six months had not elapsed before the commencement of the suit, and for anything that appears the plaintiff has no right of action against the defendant.

C. Robinson for the demurrer, J. B. Read contra.

ROBINSON, C. J.—The defendant is entitled to judgment on this demurrer. The plaintiff states that the defendant, on

the 9th day of March, made his promissory note, promising to pay six months after the *date thereof*, which period had elapsed before the commencement of the suit.

It does not state in express terms when the note was dated, and it is true that it is from the date of the note, and not from the actual time of making it, which may have been on a different day, that the six months are to be reckoned; but where we have no intimation to the contrary in the pleadings, the inference is, that the notice was dated on the day when it was made—in other words, according to the truth of the case.

If the fact were otherwise here, and the note was written and dated some days before it was signed, the plaintiff might have made all consistent and right by shaping his statement according to the circumstances. We are left here, however, to understand, that on the 9th March the defendant made his note, payable in six months; and as the action appears on the record to have been brought on the 10th of September, we must look upon the plaintiff as having sued before the three days of grace had expired, and consequently before his right of action accrued.

The case of Owen v. Waters (2 M. & W. 91,) decides this case.

DRAPER, J.—By our rule No. 16 of Hilary term, 13 Vic., it is ordered that every declaration shall in future be entitled in the proper court, and of the day of the month and year on which it is filed, and shall commence as follows:—

(Date)

(Venue)—"A. B. by E. F. his attorney (or &c.), complains of C. D., who has been summoned to answer the said A. B. by virtue of a writ issued on the ——day of ————in the year of our Lord ——, out of her Majesty's court of Queen's Bench at Toronto, (or out of the court of Common Pleas at Toronto, as the case may be, &c.")

The courts are expressly empowered by 12 Vic. ch. 63, to make rules in reference to the carrying out that act; independently of which they would, I apprehend, at common law, have had authority to make the rule in question. The commencement is part of the declaration. The rule of court

requires the declaration to commence by a statement of the writ by which the defendant was brought into court, because that writ is the commencement of the action; and such statement, so inserted, may, I think, be properly held to be part of the declaration. If this be so, then the words of Lord Abinger, in Owen v. Waters (2 M. & W. 94) strictly apply: "If it appears on the face of the declaration that the action was commenced and the first writ issued out before such right of action had accrued, that would be wrong." And as to the declaration not stating in terms the date of the note, a few lines further on, in the same judgment, it is said, "we may very fairly suppose the bill bears date the day on which in the declaration it is stated to be made." I think defendant should succeed on the demurrer.

Burns, J., concurred.

Judgment for defendant on demurrer.

HILL V. LOTT.

Account stated-Evidence.

A claim upon an account stated cannot be supported by a note which was not due at the commencement of the suit, and the defence is available under the general issue.

Same case as the preceding.—The declaration contained a count upon an account stated (in addition to that upon the note), to which non-assumpsit was pleaded. The only evidence offered in support of this count was the note, which had not matured when the action commenced. It was contended at the trial that no objection on this ground was open to the defendant, such defence not being specially pleaded; and a verdict was taken for the plaintiff subject to the opinion of the court.

Leith, for the plaintiff, cited Gatty v. Field, 15 L. J. (Q. B.,) 408; Hammond v. Dayson, 15 M. & W. 373; Clayton v. Gosling, 5 B. & C. 360; Petch v. Lyon, 15 L. J. (Q. B.) 398; Wheatley v. Williams, 1 M. & W. 533.

C. Robinson, contra.

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Robinson, C. J.—The demurrer on which we have just given judgment for the defendant in effect decides this question upon what is now admitted to be the state of facts, while this statement of the case shews that the declaration could not have been so framed, consistently with the truth, as to have shewn a good right of action existing upon the note at the time that the action was brought upon it, for it now appears that the three days of grace, which are strictly claimable as a legal right, had not elapsed when the summons was sued out. But the plaintiff submits to us, that whatever may be his difficulty in recovering upon the note, he can nevertheless recover the money upon the account stated, although the only evidence of account stated is the note itself, and though the note, when produced, shewed that the plaintiff was suing for his money before it was due. That is too plainly untenable to admit of argument, for it might as well be contended that when a merchant sells goods to a customer, and gives a bill of the contents with a note at the foot that the account is payable at a future day named, if the purchaser also signed the memorandum in admission of the correctness of the account, he might be sued immediately for the money notwithstanding the credit given. The case of Wheatley v. Williams (1 M. & W. 533), on which Mr. Leith relied, proves nothing more than that an account may be stated of a sum to be paid at a future time. It does not prove what the plaintiff requires to establish in this case, that an action can be brought upon the account stated before the credit has expired. Indeed this case is a plain authority against the plaintiff-2 Stark E., page 98, note o.

As to the necessity for a special plea in this case, it is clear that there was no such necessity. If the right of action had once accrued, but was afterwards suspended by reason of something that had taken place, then such new matter must have been pleaded; but in this case we have no evidence whatever of an account stated, or of any debt between these parties except the note, upon which it is clear no assumpsit could be implied by law to pay immediately, in face of the express contract; in other words, when the plaintiff produced the note at the trial he did not give proof of an admission or

account stated by the defendant of money due by him on the 9th of March, or at any time before the note, by the terms of it, was payable.

DRAPER, J .- The special case raises this question, whether the plaintiff can recover on the account stated by producing and proving the note, giving no other evidence, and the note appearing not to be due at the time of the action commenced. Wheatley v. Williams (1 M. & W. 532) is in defendant's favour. The instrument acknowledged £80 7s. due, and contained a promise to pay that sum in two years, Lord Abinger p. 541) says, "the paper is evidence of an account stated at the time when it was signed, but it shews also that the cause of action did not accrue until two years afterwards." According to Early v. Bowman (1 B. & Ad. 889), the account stated must be taken to be a reckoning on this promissory note, for nothing else is shewn in evidence as to which there could have been any reckoning on account stated. If the evidence had shewn the particulars of a preexisting debt, to secure which or on account of which the note was taken, it might have been necessary to have pleaded to the count on an account stated that the promissory note was given on account of that debt, and was not yet due. But when the only accounting apparent from the evidence is upon and with respect to a note not due at that time, I do not see that we may not treat the account to be on the footing of the note-i. e., debitum in præsenti solvendum in futuro; or if from the form of such a count, it must be taken to be of and concerning moneys before then due, and then in arrear and unpaid, then it might be said that a promissory note not due when the action was commenced would not prove the account stated. Thomas v. Hawkes (8 M. & W. 140) favours the view that a special plea was not necessary, for if on non-assumpsit the defendant may shew that the accounts, the correctness of which he has admitted, were in fact incorrect, and therefore that such accounts did not shew him to be indebted, why may he not equally shew that the time for payment of the debt respecting which the account was taken has not yet arrived? Non-assumpsit raises the defence that goods were

sold on a credit not expired-Broomfield v. Smith (1 M. & W. 542), also Cousins v. Paddon (2 Cr. M. & R. 547). The only case that appears only to favour the necessity of a special plea is that of Littlechild v. Banks (7 Q. B. 739), which may be distinguished, and which I shall not be surprised to find overruled.

Burns, J., concurred.

Judgment for defendant.

Burns v. Kerr.

Evidence—Letters written "without prejudice"—Improper reception of evidence—Not ground for new trial, where other sufficient evidence.

In an action of trespass for an assault the act was proved, but there was no evidence to identify the defendant as the person who committed it. To supply this letters were put in, which had passed between the attorneys on either side with a view to a settlement, the first of which was written expressly "without prejudice." The plaintiff's attorney, who produced the letters, also swore that the defendant had called on him, and admitted that it was he who struck the plaintiff. The jury found for the plaintiff. Semble, that the letters should not have been received, even for the purpose

of proving the identity; but as the other testimony was sufficient to

warrant the verdict, the court refused to interfere.

TRESPASS for assault and battery.—Plea, not guilty.

At the trial at Toronto, before Robinson, C. J., it appeared that the plaintiff had been badly beaten. Two gentlemen driving along the road saw at a distance one man knock another down, and use him brutally. It was near the roadside. By the time they got to the place the person who inflicted the blows had gone away, and they could not identify him at the trial.

There was no evidence given to shew who it was that had beaten the plaintiff; and when the plaintiff said he had closed his case the defendant applied for a nonsuit, for the want of any evidence to shew that it was he who had committed the act.

The learned Chief Justice being obliged to say that there was really no evidence to charge the defendant, the plaintiff's counsel then insisted strongly that he had no reason to imagine that it was intended to deny at the trial that it was the defendant who had struck the plaintiff, for that he had admitted it to the plaintiff's attorney, and that a correspondence had taken place between the attorneys for both parties on the subject of the action, which correspondence he begged to be allowed to produce. This was resisted on the ground that it was a proposition to buy peace, and, since it was not accepted, was not binding, and could not be given in evidence against the defendant. It was asserted also that the letters were written, as it is termed, "without prejudice." The learned Chief Justice said, that as to any confidence, there was none in general Implied in regard to communications between a party and the attorney for the opposite party, and that although offers made with a view of settling a case were not binding upon a party, if they were rejected, yet he thought a correspondence with a view to a settlement might be given in evidence, merely to prove the connection of the party making the offer, or writing the letter, with the cause of action; in other words, to prove identity.

The letters were produced and allowed to be read, the defendant's counsel strongly opposing their admission. first was dated 13th August, 1855, a letter from the defend-

ant's attorney to the plaintiff's attorney, as follows:

"Mr. Henry Kerr has handed us your letter of the 7th inst. in which you threaten him with legal proceedings for assault and battery at the suit of one Burns. Our client, although utterly denying and repudiating all legal or other liability in this matter, or knowledge thereof, would nevertheless, without prejudice, and for the sake of buying peace, be willing to pay a reasonable sum of money to your client. We write this therefore on his behalf, and request that you will be kind enough to inform us of the very smallest sum your client will' take, and if it can be agreed to it will be paid; if not, we will inform you and accept process for Mr. Kerr. This is written without prejudice to our just defence. Please answer to-day, as our client is in town."

The second letter was from the same to the same, dated the

15th August, as follows:

"We have just received yours in reference to the matter Burns v. Kerr, and in reply beg to state that apparently we cannot come to terms, all we are authorized to offer to buy peace in this matter is £5 cash, and the remission of a debt of £1 2s. 6d.; in all £6 2s. 6d. From our instructions in this matter, we conceive your client, if he accepts, will be the gainer to the amount offered, and that if he persists he may fare worse; should he not accept the offer made, we will accept service of process whenever you issue it."

Another note was written from the same to the same, on the 16th of August, as follows:

"Burns v. Kerr.—We have just received yours, and in reply beg to say that we will take the earliest opportunity of communicating with our client, and laying your propositions before him, and receiving his instructions thereupon. We have not seen him since Monday, when we first wrote to you on the subject, and when his proposition was that which we yesterday communicated."

The plaintiff's attorney, who produced these letters, was sworn as a witness, and stated that he knew the defendant, and wrote to him when he was employed to bring the action; that the defendant called on him in consequence, and introduced himself as Henry Kerr; that the witness told him he would do better to settle the case, and asked him how—i. e., in what manner, with what weapon or otherwise,—he had abused the plaintiff. The defendant answered, "just with his hands."

The learned Chief Justice told the jury there was sufficient proof of identity, and left them to find such damages as they thought right. They found for the plaintiff, and £37 10s. damages.

Dempsey obtained a rule Nisi for a new trial on the law and evidence, and for the reception of improper evidence, and for excessive damages.

The cases cited are referred to in the judgment.

Robinson, C. J., delivered the judgment of the court.

Of the cases cited by the defendant's counsel, Cory v. Bretton (4 C. & P. 462) is not exactly in point, because there the court determined that the letter, being written without prejudice, could not avail to take the case out of the Statute of Limitations. It was not an unconditional promise to pay the debt, but that the party would pay if the plaintiff would take what he offered; and to take the case out of the statute, the promise must be unconditional—Healey v. Thatcher (8 C. & P. 388) is more in point, and also Paddock v. Forrester (3 M. & Gr. 920, 3 Scott N. R. 734,) is more to the pur-

pose; and these seem to go the length of deciding that a letter containing the reservation which the first letter in this correspondence does, of being written without prejudice, ought not to be read; and the language of the learned judges in these cases is so strong, that we may perhaps assume that they would not have received them in evidence even for the mere purpose of proving the identity of the defendant, for which purpose only they were admitted in this case, for I told the jury expressly, that any offer made in the letters was not binding on the defendant, as it was not accepted; but for the purpose of shewing that the defendant admitted that he was connected with the cause of action, I thought they might be read.

It remains still to be considered, however, whether a new trial should be granted, considering that the plaintiff proved by evidence quite independent of this correspondence between the two attorneys that the defendant did admit that he struck the plaintiff on the occasion which has given rise to this action; that certainly would leave no doubt that he was the person who had been seen by other witnesses engaged in beating the plaintiff, but at too great a distance to enable them to identify the person—Doe dem. Lord Teynham v. Tyler (6 Bing. 561).

DRAPER, J., referred to Phillips on Ev. 366, 8th Ed. Burns, J., concurred.

Rule discharged.

McPherson v. Norris.

Lease; construction of-Terms of tenancy.

Trespass to lot 10 in the town of London. The plaintiff in his replication averred that the defendant had leased the said close with the appurtenances to the plaintiff particularly mentioned and described in the indenture (of lease) except as in the said indenture is excepted, from the 1st of November then next until the 1st of April then next, and so on from year to year thereafter, so long as the plaintiff should remain in possession of the said close and premises. The indenture when produced was a lease to the plaintiff of "that certain frame house now standing and being on lot number ten," &c, "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows. from the 1st day of November now next ensuing for and until the 1st day of April following, a period of five months," at a monthly rate of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold possession of said premises, and should remain longer than the first of April, he should pay at the rate of £50 per annum as rent, to be paid monthly.

Held, that the replaction was not supported, for that the lease was a demise

till the 1st of April, with an option to the lessee to remain afterwards as a monthly tenant (not from year to year) at the rate of £50 a year; and that it was not a demise of the whole of lot 10, as alleged.

TRESPASS quare clausum fregit. The premises were described in the declaration as a certain close of the plaintiff situate in the town of London, known as lot number ten on the south side of Bathurst street, bounded on the north by Bathurst street, and on the west by Richmond street, and on the east by a certain close known as lot number nine on the south side of Bathurst street. The trespasses charged were breaking to pieces two gates, locks, staples, and hinges, and breaking down forty perches of fence, and taking up the posts, by which the plaintiff lost the use of his garden.

Pleas-1. Not guilty. 2. That the close was not the plaintiff's. 3. Liberum tenementum. 4. Leave and license.

The plaintiff replied, taking issue on the first and second pleas, and to the third plea he answered, that on the 21st of October, 1853, by an indenture made between the plaintiff and defendant, the defendant leased the said close with the appurtenances to the plaintiff, particularly mentioned and described in the indenture, except as in the said indenture is excepted, to have and to hold the same to the plaintiff from the 1st of November then next, for and until the 1st day of April then next, and so on from year to year thereafter, so long as the plaintiff should remain in possession of the said close and premises, at the rent and on the terms in

the said indenture mentioned, under which the plaintiff was possessed. To the fourth plea the plaintiff replied de injuriâ.

The defendant rejoined to the replication setting up the lease non est factum.

At the trial, before Burns, J., at the last assizes held at London, the facts appeared in evidence as follow:—The house and garden attached on the lot in question had been occupied by the plaintiff for several years prior to October, 1853, and at that time the premises were purchased by the defendant, he intending to occupy it himself as soon as he could obtain possession. The plaintiff was entitled to retain the premises until the 1st of April, 1854, at the rent of £2 per month, under his arrangement with his first landlord. When the defendant purchased, the plaintiff and defendant entered into a lease in these words:—

"This indenture, made this 21st October, 1853, between, &c., witnesseth that the party of the first part, for and in consideration of the rents, covenants, promises, and agreements hereinafter contained, on the part of the party of the second part to be paid, kept, done and performed, hath demised, leased and let, and by these presents doth demise, lease and let unto the plaintiff, his heirs and assigns, that certain. frame house now standing and being on lot number ten on the south side of Bathurst-street in the said town of London, and being that house now occupied by him, also the use of half of the barn standing on said lot for the use of his two cows, from the first day of November now next ensuing for and until the first day of April following, a period of five months, yielding and paying therefor monthly and every month the sum of £2 currency, to be paid on the first day of each month. And the plaintiff covenants with the defendant to pay rent, and to keep up the fences, and will not assign or sublet without leave, and that he will leave the premises in good repair-Proviso for re-entry by the defendant on nonpayment of rent or non-performance of covenants. And it is further agreed by and between the parties hereto in manner following, that is to say, that if the said plaintiff should withhold possession of said premises, and should remain any longer in said house than the said first day of April, he doth

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covenant to pay at the rate fifty pounds per annum as rent for the said premises, to be paid monthly as aforesaid, and he doth further agree and consent that the defendant shall have liberty to use and occupy half of the said barn. And the defendant covenants with the plaintiff for quiet enjoyment; and lastly, that this lease and everything, article, clause and condition herein contained, are made in pursuance of a certain act of Parliament, &c.

On production of this instrument it was objected on the part of the defendant that it did not support the plaintiff's allegation of the lease set out in the replication to the third plea, as being a lease from year to year. The learned judge reserved leave to the defendant to have a verdict entered for him upon the third plea, if the court should be of opinion that the lease produced did not support the replication, and allowed the case to proceed. The facts then appeared to be these :- In the spring of 1854, about the middle of March, the defendant desired to know whether the plaintiff intended to remain after the first of April, for he wished to commence the necessary repairs before occupying the place himself; one portion of the repairs being that of putting a new fence around the lot, the former fence having become dilapidated. The defendant told the plaintiff that he would like at once to commence repairing the fences, and the plaintiff said there was no objection to his doing so. The defendant, on the 22nd of March, 1854, entered into a contract with a carpenter for the repairs required to be done to the house, and to remove the old fence and put up a new one. The carpenter commenced immediately and removed the old fence, and made some preparation for the new one, and the plaintiff saw the work going on from day to day, but made no objections. On the 3rd or 4th of April the defendant applied for possession of the house, and the plaintiff replied he did not intend to stay, and would leave as soon as he could get another house. did not leave however, but continued to live in the house until the following November, when he left it. He paid the rent monthly at the specified rate of £50 a year. When the defendant found that he could not obtain possession of the house, he ceased to go on with the building of the new fence, and consequently the lot lay open as a common all summer.

The action was brought for removing the fence, and thereby preventing the plaintiff from using the garden during the summer of 1854, and exposing the place to cattle and pigs destroying the shrubs, and the annoyance the plaintiff was put to.

The defendant renewed the former objection, and also objected that the plaintiff could maintain no action of trespass for removing the fence, or the loss thereby of the garden, for under the lease nothing but the house and half of the barn could be claimed by the plaintiff. The learned judge reserved leave to the defendant to move the court to enter a nonsuit on these points, and left the question to the jury on the plea of leave and license. The jury found for the plaintiff, and damages £5.

Paterson obtained a rule to shew cause why a nonsuit should not be entered pursuant to the leave reserved, or why the verdict should not be set aside, and a new trial had between the parties, the verdict being contrary to law and evidence and the judge's charge.

Hagarty, Q. C., shewed cause, and cited Doe Monck v. Geekie, 5 Q. B. 841; Dyatt v. Griffiths, 17 Q. B. 505, Woodf. L. & T. 149; Cox v. Bent, 5 Bing. 185; Hegan v. Johnson, 2 Taunt. 148.

Wilson supported the rule, citing Smith v. Royston, 8 M. & W. 381, Cro. Car. 17.

ROBINSON, C. J., delivered the judgment of the court.

The evidence in this case seems to be such as clearly entitles the defendant to a verdict on the plea of license, which would, so far as we can judge from the notes of the trial, have disposed properly of the case upon the merits.

The verdict however is only £5; no misdirection is complained of; and we should be reluctant to interfere if the legal objections taken by the defendant are not found entitled to prevail.

As to the exceptions on which the defendant has leave reserved to him to move for a nonsuit: We do not consider that the lease between these parties amounts to a demise to hold by the year—or, as the plaintiff describes it in his replication, to hold till the first of April then next, and so on

from year to year thereafter, so long as the plaintiff shall remain in possession of the said close and premises.

It was a demise for five months till the first of April, at the rent of £2 a month to be paid monthly, with the understanding that if the lessee should withhold possession, and remain any time longer in the house till the first of April, then he was to pay at the rate of £50 per annum as rent, to be paid monthly; and the lessee covenants that he will pay accordingly.

This gives to the lessee, we think, an option to remain after the first of April, as a monthly tenant, at the rate of £50 a year, but constituting a tenancy which the landlord may at any time put an end to upon a month's notice. case cited by Mr. Hagarty from 5 Q. B. 841, favours this view rather than otherwise, but it does not seem to us to be altogether applicable. There is less room, we think, for doubt on the other point of the case, for it seems to us clear that the demise "of the frame house being on lot number ten on the south side of Bathurst street, and being that house now occupied by him, also the use of half the barn standing on the said lot for the use of his two cows," is not what the plaintiff described it to be in his replication, a lease of lot number ten on the south side of Bathurst-street, with the appurtenances particularly described in the indenture, except as in the said indenture is excepted.

The plaintiff, in our opinion, has taken a liberty with the indenture which is altogether inadmissible. There are no "appurtenances particularly described in the indenture" except the one half of the barn on the lot, and that is appurtenant, or rather to be held, not with lot number ten, but with the house on lot number ten. And as to "exception," there is none in the indenture, and we do not see what the plaintiff means by it, unless it is that the half of the barn which he was not to be allowed to use is thereby excepted from the lease, but that is not more excepted than the whole lot is excepted, beyond what the house and half the barn stands on. We think the whole lot cannot be held under this lease to pass with the house. That would be contrary to the general principle that a demise of the land passes the house which is on the land, while the demise of a house

merely will not pass the field, lot or farm on which it stands, though a demise of the house "with the appurtenances" will pass the house with the orchard, yard, and garden, but not the land generally; and, however, it might be if the land were in extent only what would usually be required for the convenient use and occupation of the house, a difficulty is created in this case by the indication of a contrary intention which is given by the express grant of the use of half of the barn on the lot. That seems to be inconsistent with the idea that the whole of the lot was to go with the house, for in that case it would have been the landlord who would have reserved to himself the use of half the barn out of the demise of the whole premises, instead of adding the use of the other half to the demise of the house, as something additional to what he was otherwise demising.

The covenant taken from the lessee "to keep up the fences" does certainly, on the other hand, give strong ground for inferring that the lessor did mean to lease the whole lot, though he only demised the house on the lot; but we must judge of what people mean by what they say, when the extent and meaning of the words used is clear, and certainly the lease of a house on a lot is not a lease of all the lot. If there had been nothing said about the lessee keeping up the fences, we do not see that there would have been the least room for doubt, and we cannot allow that stipulation to have the effect of converting what is actually and in terms a lease of the house only into a lease of the lot, because we cannot know judicially that the parties did not mean that the fences were to be kept in repair around the lot, as part of the consideration for occupying the house and part of the barn; neither can we judicially know that before the lessee could enter into the house there might be some small area inclosed which must of necessity pass with the house, and that the fence around that may have been all that was intended to be referred to.

We do not much doubt, after reading all the evidence, that the understanding was that the plaintiff was to have possession of the lot, though the agreement about the barn would seem to point to a contrary intention; and, whatever may have been meant, we must look in these cases at what is said; and we cannot, where something certain is plainly expressed. add to that by implying something that is not expressed, and that is besides not allowed by the rules which govern the construction of such instruments to be implied as the meaning of the words used.

We think the rule for nonsuit must be made absolute.

Rule absolute.

BURR ET AL. V. WILSON ET AL.

Stoppage in transitu.

A. living in Kingston, bought six cases of goods in New York, and saw them packed and leave the vendor's shop on their way to the shipping warehouse; on their arrival in Kingston they were received by the officers of the customs, and placed in the custom-house store: A. entered and paid duty upon and took away two of the cases; he also paid the freight and charges upon all from New York.

Held that the vendor had not lost the right of stoppage in transitu over the remaining four cases.

TROVER, for four cases of dry goods. Pleas—1. Not guilty. 2. Not possessed. 3. That the goods belonged to one Fahey. 4. That the goods were defendant's property. A verdict was taken for £750, subject to the opinion of the court on the following

CASE.

The plaintiffs, merchants in New York, sold to one Michael Fahey, of Kingston, tailor, certain cases of mer-The goods were selected by Fahey himself, who saw them packed and leave the warehouse of the plaintiffs on their way to the shipping warehouse. On purchasing the goods Fahey gave the plaintiffs his promissory notes for the price of the goods, which notes were in suit in the Court of Common Pleas at the time of the alleged stoppage in transitu hereinafter mentioned. On the arrival of the goods in Kingston they were landed at the custom-house wharf, received by the customs officers, and placed in the customhouse store. No entry in the custom-house was made by Fahey in respect of them, nor were any duties paid. Subsequently, and before the alleged stoppage in transitu hereinafter mentioned, Fahey entered, paid duty, and removed from the customs warehouse, two cases out of the six which were there. Shortly afterwards he became embarrassed, and called a meeting of his creditors, at which meeting the plaintiffs were represented. Fahey there proposed to make a general assignment of his effects to the defendants, for the benefit of his creditors who should become parties to

the assignment. To this proposition the plaintiffs' agent, in ignorance of the position of these goods, assented. During the meeting, however, it came out that these goods were in the custom-house warehouse, and the plaintiffs thereupon immediately notified the wharfinger who had it in charge, and who had possession of the warehouse conjointly with the custom-house authorities, not to deliver the goods to the defendants, and demanded that he should deliver them to the plaintiffs, claiming to have stopped them in transitu. is also admitted that the day after the alleged stoppage in transitu the assignment from Fahey was executed by him and by the defendants, but not by the plaintiffs; and that when the alleged stoppage in transitu took place the goods were in the possession of the wharfinger in question, subject to the permit of the custom-house officers and Fahey's order on production of permit and payment of duties; and further, that the freight of the goods from New York, and all charges, had been paid by Fahey.

If, under these circumstances, the court should be of opinion that the transitus had not terminated when the goods were demanded from the wharfinger as above mentioned, a verdict to be entered for the plaintiffs. If, however, the court should be of opinion that the transitus had terminated, or that, from any of the circumstances mentioned, the right of stoppage during its continuance could not be exercised by the plaintiffs, the verdict to be entered for the defendants.

Van Koughnet, Q. C., for the plaintiff, contended that the goods had never been within the control of the vendee so as to put an end to the right of stoppage. They were in the custom house, in no different position than they would have been if they had never left New York; there was something still for him to do; he had obtained no permit to take them out, and had not paid the duties. As to the delivery of the two cases, that could have no effect upon the others, the packages were separate, and this action is only brought for the four which remained .- Smith Merc. Law, 5th Ed., 524, et sequ; Key v. Cotesworth, 7 Ex. 595; Northey v. Field, 2 Esp. 613; James v. Griffin, 1 M. & W. 20; James v. Griffin, 2 M. & W. 622: Tanner v. Scovell, 14 M. & W. 28; Edwards v. Brewer, 2 M. & W. 375; Wentworth v. Outhwaite, 10 M. & W. 450; Wilmhurst v. Bowker, 2 M. & Gr. 792; Turner v. Trustees of Liverpool Docks, 6 Ex. 543; Ellershaw v. Magniac, 1b. 570; Newsom v. Thornton, 6

East I7; Dixon v. Yates, 5 B. & Ad. 313; Biddlecombe v. Bond, 5 A. & E. 332; Buckley v. Furniss, 13 Wend. 137.

The Solicitor General, contra.—The case admits the goods to have been held subject to Fahey's orders; they were therefore in his possession. The statute 10 & 11 Vic. ch. 31, sec. 12 provides for entering goods: the word "entry," as used there, means nothing more than bringing the goods and leaving the invoice; he had in fact entered them. Here the cases could not have been stopped between New York and Kingston, for the vendee himself had packed them at New York, and shipped them there, and they were at his risk from that time. The custody of the custom-house officer is not the possession of the wharfinger, and notice to the wharfinger was of no use, for he had no control over the goods; he was merely the servant of the custom-house officer to hold them.-Dodson v. Wentworth, 6 Jur. 1066; Jones v. Jones, 8 M. & W. 431; Whitehead v. Anderson, 9 M. & W. 518, 534; Betts v. Gibbins, 4 N. & M. 64; 1 Denio, 487.

ROBINSON, C. J.—The law appears to be clearly with the plaintiffs upon every point of the case.

Upon the facts stated, there can be no question upon the vendee's insolvency being sufficiently made out to justify the exercise of the right of stoppage in transitu. Nothing that took place at the time of the purchase of the goods at New York interferes with the exercise of that right; the vendee giving his note for the price, and paying freight and charges are no reasons against it; and there is nothing in the case stated that shewed the goods to have been in the actual possession of the vendee at any time before their arrival at Kingston.

Then as to what occurred there, the case of Northey v. Field (2 Esp. 613) is expressly in point, to shew that the goods while in the customs warehouse, subject to payment of duties, are not to be looked upon as in the actual possession of the vendee so as to put an end to the transitus.

Neither did the vendee's having paid the duty on two of the cases, and taken them out of the custom's warehouse, carry with it the consequence contended for—namely, the giving him constructively possession of the whole. The authorities are abundant and clear on all the points. With respect to the last point—namely, the effect of the delivery of part of the goods to the vendee—the case of Tanner v. Scovell (14 M. & W. 36) is a clear authority.

I refer also to Hanson v. Meyer (6 East, 625); Dixon v. Yates (5 B. & Ad. 337.)

DRAPER, J .- The plaintiffs, by selling the goods to Fahey, and taking his promissory notes for the price, gave him both the right of property and the right of possession. The property has been so vested that he would, I apprehend, be liable to a loss by an accidental fire, &c., but his right to the possession was liable to be defeated at any time before he obtained the actual possession, if he turned out to be insolvent. The dispute which arose in this case turns entirely on the question whether the transitus was at an end, or whether Fahey obtained the actual or constructive possession of the goods. The goods arrived at Kingston, where Fahey resided. Being liable for duties, they were taken charge of by the custom-house officers, and were placed in the customhouse store, no entry of them being then made, nor duties on them paid. This proceeding was in accordance with the 10 & 11 Vic. ch. 31, sec. 12. Fahey did enter and pay duties on two cases, and took them away; the residue remained in the custom-house store until after Fahev failed to pay his promissory note, and until the plaintiffs' agent notified the warehouse-keeper not to deliver them, claiming on the plaintiffs' behalf the right of stoppage in transitu. This is so exactly the case of Worthey v. Field, that I think it unnecessary to make any further remarks. I think the plaintiffs entitled to recover.

Burns, J., concurred.

Judgment for plaintiffs.

TYRE V. WILKES.

Action against shareholder by creditor of a R. W. Co.—Plea of payment to the Co—15 & 16 Vic. ch. 51, sec. 19.

The plaintiff, a creditor of a railway company, having had his execution returned nulla bona, sued the defendant, a shareholder, for the amount remaining unpaid upon his stock. The defendant plended, that before the commencement of this suit the railway company sued him for the same moneys, and that after being served with the writ of summons in that case, and before declaration in either case, and after the commencement of this suit, he paid the company in full.

Held, no defence, as it was not averred that such payment was made in

ignorance of the plaintiff's claim.

DEBT.—Writ issued 7th of June, 1855—Declaration filed 18th of September, 1855.

The declaration set out that after the passing of the 14 & 15 Vic. ch. 51, and of the act incorporating the Buffalo. Brantford and Goderich Railway Company, 16 Vic. ch. 45, the defendant held fifty shares in the stock of the said company; that £250, viz, £5 on each share, remained unpaid on such stock; that the plaintiff had recovered judgment against the company in the Court of Common Pleas, for £203 5s. 5d. damages and costs, for the non-performance of certain promises, and had sued out a Fi. Fa. upon such judgment against the company, which was returned nulla bona; that the plaintiff had obtained no satisfaction upon such judgment, and there was then due and owing upon it a large sum, to wit, &c. By means of which said premises, and by force of the statute, &c., an action hath accrued to the plaintiff, to demand and have from defendant the said sum so due upon the said judgment, being parcel of the amount still remaining unpaid by defendant upon his said shares, &c., &c.

Fourth plea—(in substance) that the plaintiff ought not to maintain his action against the defendant, because he says that the said railway company, before the commencement of this suit, to wit, on the 16th of August, 1854, sued out of the Court of Common Pleas, a writ of summons against the said defendant, in an action on promises, with intent to declare thereon, by which said writ our Lady the Queen commanded, &c., (setting out the writ,) and impleaded the defendant thereupon, and for not paying the very same moneys unpaid on the defendant's shares as in the declaration

mentioned, and for which this suit is brought; that afterwards, to wit, on the 13th of September, (A. D.) 1855, and while the said suit was depending, by reason of the said suit, and for the purpose of putting an end thereto and saving further costs, he paid to the said company a large sum of money, to wit, &c., which the company accepted in full satisfaction of the said suit, and of moneys unpaid to them on account of said shares, and the stock of the said defendant in said company thereby then became and was fully paid up: verification.

Demurrer—That the said plea is double, in this; that it sets up the pendency of a former suit against the defendant, and also a payment to the plaintiff in that suit, either of which would be a defence; that if the former allegation be relied on, it should have been pleaded in abatement and not in bar; that the facts disclosed furnish no answer to the suit, as defendant admits that he did not pay the sums mentioned until after he had received notice of the plaintiff's claims and of the action being brought, and therefore such payment appears to have been made in fraud of the plaintiff in this suit.

Freeman, for the demurrer, cited 14 & 15 Vic. ch. 51, sec. 19; 12 Vic. ch. 84; 13 & 14 Vic. ch. 72, sec. 5; 14 & 15 Vic. ch. 121.

M. C. Cameron, contra.

Robinson, C. J., delivered the judgment of the court.

By the statute 16 Vic. ch. 45, sec. 4, the Fort Erie and Goderich Railway Company is brought within the operation of the Railway Clauses Consolidation Act, 14 & 15 Vic. ch. 51, as regards the 19th section of that act; and the consequence of that is, that every shareholder in the company is individually liable to the creditors of the company, to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole of his stock shall have been paid up; but he is not made liable to an action therefor before an execution against the company shall have been returned unsatisfied in the whole or in part.

This is an enactment very different from that made by the legislature in England in their Railway Act, 8 & 9 Vic. ch. 16, sec. 36, and seems to be an enactment less carefully guarded.

But we have only to determine whether the plea sets up a good defence. The company, according to the statements in the plea, sued this defendant upon his subscription in August, 1853, long before this plaintiff had sued the company for his debt; and in September, 1855, which was long after this, plaintiff had his execution against the company returned nulla bona; and after he had in consequence brought the present action, the defendant Wilkes, voluntarily, as it appears (for we have no account of any judgment against him in favour of the company), went to the company and paid into their hands what he owed upon his shares; that cannot necessarily be a bar to this action brought under the statute, for if it were, any company in such a case would only have to commence suits against all their shareholders without doing anything more, and after these creditors had brought their actions against the same shareholders they might receive the stock, in evident evasion of the statute.

All that we see in this plea is, that the defendant, after he has been sued by this plaintiff, goes and pays the company instead of him, and sets up the payment as a defence. There is, to be sure, the additional circumstance, that the company had brought an action against him, before this plaintiff brought his, but we hear of no proceeding in such action after the writ, though nearly two years had elapsed; and by merely bringing an action, the company cannot, we think, in such a case, prevent the operation of the statute. It would have been a good defence if this defendant had paid his money in ignorance of the present plaintiff's claims, by reason of the insolvency of the company; and it is possible that he may have done so, for the writ, we suppose, gave him no information of the nature of the plaintiff's claim. He did not wait for the declaration, which would have given him that information, but between the service of the writ and of the declaration he paid the money to the company.

This seems to bring the case to this point: Ought the

defendant to have averred in his plea that he paid the company without notice or knowledge of the plaintiff having an execution against the company returned nulla bona; or may he rely upon his plea without that averment, and leave it to the plaintiff to reply that he had notice? In our opinion the denial of such notice forms an indispensable part of such a defence, for any plea should be such as to constitute with certainty a good bar, if its statements be true; but this plea tells us only, that after this action was brought the defendant chose to turn his money into another channel, wherefore he cannot pay the plaintiff. He should have shewn that he paid it under circumstadces that made him safe in paying it, and that he did not knowingly and voluntarily defeat the intention of the legislature.

Judgment for plaintiff on demurrer.

ADAMS V. FORDE AND M'CAULY.

Promissory note-Pleading-Duplicity and repugnancy.

Assumpsit on a promissory note for £50 by payee against makers—Plea, that the defendants were in partnership, and it was agreed that they should admit the plaintiff into their firm as a partner, on his advancing £1000: that the defendants, in part performance of such agreement, caused alterations to be made in their store, and the plaintiff afterwards became proprietor of the same, and advanced £50 on account thereof, and to assist the defendant in making such alterations, and for securing the same to the plaintiff, defendants, on the understanding that said note was to form part of the consideration money for accepting the plaintiff as a partner according to said agreement, signed said note for the accommodation of the plaintiff, and have always been ready to receive the plaintiff as a partner on his paying the balance of said money: but the plaintiff has always refused to pay such balance, or become a partner, or pay for the alterations made in consequence of the agreement.

Held, plea clearly bad, as setting up three defences repugnant to each other.

Assumpsit, on a promissory note for £50, made by the defendants, under the name and style of Forde & M'Cauly, payable to the plaintiff.

Plea—That before the making of the agreement hereinafter mentioned, and of the said promissory note, the defendants were united in co-partnership under the name of Forde & McCauly, in the business of grocers and general merchants; that on the 1st of May, 1855, a certain agreement was made by and between the plaintiff and the

defendants, whereby the plaintiff agreed to advance a certain sum of money, to wit, £1000, and in consideration thereof the defendants were to accept and receive the said plaintiff, and he was afterwards, to wit, on, &c., to become and be a partner of the defendants, and entitled to a share of the profits of the cencern, and the defendants, in part performance of the said agreement, caused divers alterations to be made in the store of the defendants, and incurred divers expenses for and on account thereof, and the plaintiff, afterwards, to wit, on, &c., became the proprietor of the same, and on account thereof, and of the said co-partnership, and in part performance thereof, and to aid and assist the said defendants in making said alterations in their said store, according to the said agreement, and for the securing of the same to the said plaintiff, they, the defendants-under the understanding and in consideration that the said note was to be and form part of the consideration money for taking and accepting the plaintiff as a co-partner according to the said agreement-signed the promissory note in the declaration mentioned, for the accommodation of the plaintiff, and for no other reason or consideration whatsoever, and have always been ready and willing, upon his paying the balance of the said money, to accept and receive the said plaintiff as a partner in the said firm; but the said plaintiff refused and still does refuse to advance the balance of the said money, or any part thereof, or become a partner of the said firm, or pay for the alterations and expenses incurred for and on account of the said agreement, so made by the plaintiff and the defendants as aforesaid, but therein wholly failed and made default: verification.

Special demurrer. The causes assigned sufficiently appear in the judgment. Burns, for the demurrer, cited Wright v. Watts, 2 G. & D. 386; Stevens v. Underwood, 6 Scott 402. McMichael, contra.

ROBINSON, C. J.—This plea is clearly bad, for reasons assigned. It sets up defences which are inconsistent with each other—averring in one part that the note was given to secure to the plaintiff an advance which he had made for the purpose of making certain repairs or improvements to a store

intended to be occupied by both parties as partners. That certainly is a purpose very distinct from what is understood by making an accommodation note. And yet in another part of the plea, the defendant avers that he made the note for the accommodation of the plaintiff; and the same plea sets up, as an additional defence, that the note was given upon an understanding that it was to be reckoned in by the defendants as part of £1000 which the plaintiff was to pay in as his share of the funds to be contributed by them towards a partnership which they intended to form, but that the plaintiff afterwards refused to complete the contemplated arrangement.

This is to set up an alleged parol agreement at variance with the instrument. The three defences too are repugnant to each other, besides making the plea double; and our judgment is, therefore, for the plaintiff.

Judgment for plaintiff on demurrer.

WIGHTMAN V. DANIELS.

Promissory note—Special agreement with endorser to withdraw execution against maker—Construction of.

Assumpsit against the endorser of two promissory notes made by B. Plea, that the plaintiff held a judgment and execution against B., and it was agreed that on the endorsement of said notes by the defendant he should discharge the said B. from all liability upon said judgment and execution, &c., which he did not do, &c.

On a special case stated, it was admitted that B. arranged with the plaintiff that upon these notes being given the execution should be withdrawn; that the defendant endorsed the notes and enclosed them to the plaintiff with a letter, stating that he was informed by B. that the plaintiff held an execution against him, which the plaintiff had agreed "to discharge by his giving you the notes," that he endorsed them on that understanding, and if not so, his endorsement must be erased. The plaintiff answered acknowledging the receipt of the notes "on account of an execution against B," and stating that further proceedings against him would be suspended during their currency, but in default of payment he should feel himself in a position to enforce execution. No further communication took place between them. These notes having been protested, the plaintiff issued an alias Fi. Fa. upon his judgment.

Held, that the plea was not proved.

Assumpsit upon two promissory notes for £116 2s. each, dated 16th April, 1855, made by E. B. Butler, payable to the defendant or order, and by the defendant endorsed to the plaintiff; the first payable at three, and the second at four months after date.

Pleas—that before and at the time of the making of the said notes in the said declaration mentioned, the plaintiff held a judgment theretofore recovered by him against the said E. B. Butler, and had issued an execution thereon against the goods and chattels of the said E. B. Butler, and it was then, to wit, on the 16th April, 1855, and just before the making of the said notes in the said declaration mentioned, and the said endorsement thereof by the defendant, agreed that the said E. B. Butler should make the said notes in the said declaration mentioned, and the said defendant should endorse the same to the plaintiff, and that the plaintiff should thereupon, to wit, on the endorsement of the said notes by the defendant to the plaintiff, discharge the said E. B. Butler from all liability upon the said judgment and execution; and the defendant avers that the said E. B. Butler then, to wit, on the day and year last aforesaid, made the said notes in the said declaration mentioned, and the defendant then endorsed the same to the plaintiff upon the same understanding and agreement, and there never was any consideration for the said E. B. Bulter's making the said notes, or either of them, or the said defendant's endorsing the same, or either of them, to the plaintiff, or for the said E. B. Butler or the defendant paying the amount thereof, except as aforesaid; yet the plaintiff did not nor would, on the endorsement of the said notes by the defendant to the plaintiff, or at any time before or since, discharge the said E. B. Butler from all liability upon the said judgment and execution; but on the . contrary thereof held and still holds the said judgment and execution against the said E. B. Butler, and afterwards, to wit, on the 21st of August, 1855, placed the said writ of execution in the hands of the sheriff of the United Counties of York and Peel, with instructions to the said sheriff to proceed thereon against the said E. B. Butler. And the defendant further saith, that since the failure of the plaintiff to discharge the said E. B. Butler from all liability on the said judgment and execution, according to the said understanding and agreement, he the plaintiff hath held and now holds the said notes in the said declaration mentioned without value or consideration: verification.

Replication—De injuria.

A verdict was taken at the Toronto Fall Assizes for the plaintiff, for £105 8s. 2d. damages, subject to the opinion of the court as to whether the plea could be sustained under the two letters filed as exhibits, (which are set out below) and the following state of facts:

"This action is brought against the defendant as endorser of two promissory notes for £116 2s. respectively, made by one E. B. Butler, which were received by the plaintiff under the following circumstances: The plaintiff, on the twelfth day of April last, obtained a judgment by writ of trial against the said E. B. Butler for £114 11s. 10d. damages, and £10 10s. 3d. costs, and on the 13th day of April placed an execution in the sheriff's hands, on which Butler's property was seized. The plaintiff also, on the 11th day of April, obtained from Butler a confession of judgment for a true debt of £66 8s. 10d., and on the 17th day of April entered judgment, but no execution was ever issued on this judgment. On the 16th day of April, while the sheriff was in possession of Butler's property under the execution on the first judgment, Butler arranged with the plaintiff that the execution should be withdrawn upon his giving to the plaintiff the two notes endorsed by the defendant now sued upon; and the whole amount then due for debt, interest, and costs, on both judgments, was made up at the amount of the two notes, which Butler signed and forwarded to the defendant for his endorsement. The defendant returned the notes to the plaintiff in the letter filed, to which the letter signed Robt. Wightman & Co., (written by the plaintiff's brother under his directions), is the reply. The plaintiff waited three or four days after writing this letter without using the notes, and then the plaintiff's attorney informed the sheriff that the execution in his hands was settled for the present by endorsed notes, and that it was withdrawn, it having been previously stayed when the arrangement was made with Butler. Both the notes now in suit were protested for non-payment, and on the 5th of September last an alias Fi. Fa. was placed in the sheriff's hands, endorsed to levy the balance due on the first judgment, all payments made by Butler after these notes were made (amounting to £62 19s. 6d.) having been credited This writ was on the 12th of September returned "nulla bona," Butler having at that time sold all his personal property, but on the 25th of September the sheriff paid to the plaintiffs attorney £67 2s. 7d., being the amount endorsed on the writ, which Butler paid to the sheriff some days after the writ had been returned. The amount of the

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verdict is the real debt now due to the plaintiff- There was no further communication between the plaintiff and defendant until after the notes became due, and the defendant had no notice from the plaintiff that the execution had been stayed, except that contained in the letter filed."

The following are the letters referred to:

Brooklyn, 19th April, 1855.

MESSRS. WIGHTMAN & Co.

Inclosed you will please receive two notes of £116 2s. each, signed by E. B. Butler, and endorsed by myself. Mr. Butler writes me that you have an execution against him for the amount, which you agree to discharge by his giving you the notes. I have endorsed them with that understanding. If not so, you will not use the notes, but erase my endorsement. Please advise me about it by return of mail.

(Signed) R. Daniels.

Toronto, April 21, 1855.

MR. R. DANIELS,

Sir,—Your favour, dated the 19th is to hand, enclosing two notes drawn by Mr. Butler and endorsed by you, together amounting to £232 4s., which we have received on account of an execution against Mr. Butler.

Further proceeding against Mr. B. is now stayed, and judgment will be suspended during the currency of said notes, but in default of payment, of course we shall feel ourselves in

a position to enforce execution.

(Signed) ROBERT WIGHTMAN & Co.

Hector Cameron, for the plaintiff.

M. C. Cameron, contra.

Duke v. Andrews, 2 Ex. 290; Jordan v. Norton, 4 M. & W. 155; Routledge v. Grant, 3 C. & P. 269; Wontner v. Shairp, 4 C. B. 404; Richards v. Thomas, 1 Cr. M. & R. 772; Moggridge v. Jones, 14 East 486; Irving v. King, 4 C. & P. 307; were cited upon the argument.

ROBINSON, C. J., delivered the judgment of the court.

It appears that the understanding between the plaintiff and Butler his debtor was that the execution should be withdrawn, on his giving the plaintiff endorsed notes. That would not import that the judgment was to be treated as satisfied, so as

no other execution could ever afterwards issue upon it. This is all the account we have of any agreement or negotiation before the notes were made, and it is consistent with the plaintiff's letter of the 21st of April.

But of course it is the understanding between the plaintiff and the defendant that must govern the matter, and what passed between the plaintiff and Butler is only of consequence as throwing light upon anything that may appear ambiguous.

The defendant had a right to make what stipulations he pleased, and we cannot be certain that Butler told him truly the substance of his proposition to the plaintiff; so that it is what passed between the plaintiff and defendant that we are to look at, and we must be governed by that if it points to anything clear.

In his plea the defendant states that the plaintiff agreed that on the note being made and endorsed he would discharge Butler from all liability upon the judgment and execution. We see no proof of such undertaking. It was admitted that that was not what Butler had himself asked of the plaintiff, and the defendant's note of the 19th of April says nothing of the judgment, but only of discharging the execution.

The plaintiff seems to have noticed at once the difference between what the defendant expressed and what is submitted to have been the understanding with Butler, for withdrawing execution is a different thing from discharging it, and he endeavours to prevent any misunderstanding by stating clearly what was his own understanding.

It appears to us that the defendant, by taking no exception to this interpretation put up his note, acquiesced in it, and certainly the facts as stated do not at any rate support the plea. The defendant admits that there was an agreement in respect to the notes, and in regard to what the plaintiff was to do. If so, it rests with him to shew it; he cannot say that there was no agreement because the terms of his letter were not accepted, for if there was no agreement his plea fails, and he cannot say that the plaintiff agreed to discharge the judgment, for the plaintiff expressly told him otherwise. If the defendant felt that he could safely rely upon the agree-

ment being imperfect, he should have framed his plea accordingly, and shewn the want of consideration in that way; that is, that the notes were given as part of an intended agreement which was not completed.

Judgment for plaintiff,

GILDERSLEEVE V. BONTER.

Collision of steamers-Cross-actions by both owners-Verdicts in favour of both -Second new trial granted.

In this case, being an action for injuries caused by collision of steamers, a former verdict had been given for the plaintiff, which the court set aside as being against law and evidence. On a second trial the jury found again for the plaintiff, on evidence not differing in any material respect; and at the same assizes the defendant brought a cross-action against the plaintiff (in the Common Pleas), and obtained a verdict for the damage done to his steamer upon the same occasion.

The court under these circumstances, granted a second new trial in the first

case, with costs to abide the event.

CASE, for injuries occasioned by a collision of steamers. The facts of the case are fully reported upon the first application for a new trial-12 U. C. R. 489.

The present trial took place before Burns, J., at the last assizes held at Kingston, and the jury again found for the plaintiff: damages £461 11s. 4d. The defendant, Bonter, brought a cross-action against Gildersleeve for the injury arising from the same collision, which was tried immediately after the present case, and in that the jury gave a verdict in favor of Bonter for £15, the amount of damage his boat had sustained. On the present trial it was clearly established that the lights of the "Novelty" were seen during the whole time from their being first seen at a distance of four or five miles until the collision happened; and it was not shewn that the "Canadian" was seen until too late to avoid the collision. Supposing that the "Canadian" had got back from having attempted to take the right, and was afterwards pursuing her regular course down the north shore before the collision happened, yet it was proved, on the plaintiff's part, that as the steamers approached each other, instead of putting the helm a-port, the Canadian's helm was put a starboard, so that she brought herself across the bows of the "Novelty." There was no question about this fact being so; but the plaintiff's witnesses asserted it was so done when the position

of the vessels was such that the collision could not be avoided, and it was done, as it was said, to ease the blow. On the part of the defendant, it was said by the witnesses that if the helm of the "Canadian" had been put a-port instead of a-starboard, as the statute requires, even at that time the two boats would have swung clear, though the sterns might have touched.

The learned judge told the jury that the helm of the plaintiff's vessel being put a-starboard under any circumstances was contrary to the law, as the vessels were approaching each other. The jury would consider whether that was done after the collision was inevitable, and that event rendered so by the conduct of those in charge of the defendant's vessel. If the accident happened by reason of such conduct of those in charge of the plaintiff 's vessel, the plaintiff could not recover. The jury would also consider whether it was true that if the helm of the "Canadian" had been a-port, the vessels would have swung clear; and if so, then the plaintiff could not recover. With regard to the lights, the learned judge told the jury it was clear that the plaintiff's vessel had not complied with the law; and though a party may, under some circumstances, recover for an injury where the law has not been complied with on his part, yet that it was not necessary on the part of the defendant to shew that the accident happened in consequence of the noncompliance with the law. If the collision might have happened in consequence of the "Canadian" not carrying the proper lights prescribed by law, then the learned judge said that in his opinion the noncompliance with the law by the plaintiff was such negligence as would prevent the plaintiff from recovering.

Richards, obtained a rule to shew cause why the verdict should not be set aside and a new trial granted, the verdict being contrary to law and evidence, and against the judge's charge, and upon affidavits filed. He cited Wilson v. Mc-Namara, 12 U. C. R. 446; Morrison v. The General Steam Navigation Company, 8 Ex. 733. The Solicitor-General shewed cause, and filed an affidavit in reply.

The cross-action was brought in the Court of Common Pleas; and Gildersleeve, the defendant in that action, did not move against the verdict rendered against him.

ROBINSON, C. J., delivered the judgment of the court.

When this case was before us upon an application against the verdict, we stated fully the grounds upon which it appeared to us that the plaintiff could not be allowed to recover. We felt it to be quite incumbent upon us, from the nature of the evidence, to grant a new trial. The testimony that was given upon the last trial, when the jury found again for the plaintiff, has not materially altered, or indeed I think we must say has not in any degree altered, the complexion of the case.

There is this difference in the circumstances under which this case comes a second time before us—that there have now been two verdicts rendered in the case in favour of the plaintiff against evidence, and it is not incorrect to say against law. When the evidence is conflicting, and especially if it is at all doubtful on which side it proponderates, the court always feel reluctance in disturbing successive verdicts in favour of the same party. In cases like the present it is sometimes inevitable, unless we are prepared to allow plain legal principles to be disregarded in determining the rights of parties, and the express provisions of a statute to be made of no effect.

There is now, too, in this case a further difficulty in allowing it to rest finally upon the verdict that was last given. Two juries had to deal with the facts attending this unfortunate collision at the same assizes: one jury has given a verdict for the plaintiff on this action for £461 for the injury done to his steamer, the "Canadian," which verdict cannot be right unless the other vessel, the "Novelty," was most to blame in the circumstances which led to the collision. The other jury, in a cross-action brought by the owner of the "Novelty" against the plaintiff for the damage which she sustained upon the same occasion, has given, and as it is reported by the learned judge apparently without hesitation, a verdict for the plaintiff in that action (who is the defendant in this) for the amount of the damage suffered by the "Novelty."

That verdict cannot be right unless the "Canadian" was most to blame. It has nevertheless not been moved against, and indeed upon the evidence it appears to have been manifectly proper.

It is very undesirable that an inconsistency of this kind

should occur in the administration of justice, and every reasonable effort should be made to prevent it, though it may after all be found impossible on every occasion to avoid it.

That the verdicts which have been rendered present this palpable inconsistency affords another strong reason for interposing a second time, though we much regret the necessity of

doing so.

Very recently, and while this case has been pending here, a case has been before the Queen's Bench in England, which bears most strongly against the plaintiff's right to recover in this action. I refer to Dowell v. The General Steam Navigation Company, reported in the Jurist of this year, page 800; and for the reasons which are clearly and forcibly stated in that case, we feel it to be imperative to make another effort to procure a decision in this case which shall uphold the provisions of a public statute passed from wise and humane motives, and which it is important should be properly enforced.

We grant a new trial, with costs to abide the event.

GEOHEGAN V. LAWSON.

Discount-Payment by check-Whether accepted in satisfaction or not-Evidence.

Defendant, the drawer of a bill, applied to a broker to get it discounted for him. The broker had not money at the moment, but expected to have it during the day from the proceeds of a bill maturing, which belonged to the plaintiff. The plaintiff being applied to by the broker, agreed to take defendant's bill. The bill coming due was not paid in money, but the broker was offered a check of one of the parties to it, which he refused to receive unless marked "good;" and the bank was then closed for the day. The broker then said he would take the check if defendant would accept it in discount of his bill; and defendant being applied to took the check and handed the bill to the plaintiff, and as it was for a larger sum than the bill, he paid the difference to the giver of the check. He also paid the broker's charges. The check was dishonoured, and the plaintiff having sued defendant upon his bill, the learned Chief Justice directed the jury that the question for them to decide was, whether defendant accepted the check as absolute payment, or not; and that if they believed the broker's account (as given above, contradictory evidence having been also adduced,) they should find for the plaintiff.

Held, that the direction was right, and that the evidence warranted a verdict

in the plaintiff's favour.

Assumpsit upon a bill of exchange for £150. The trial took place before *Robinson*, C. J., at the last assizes held at Toronto, and the only question was, whether the defendant, Thomas Lawson, the drawer of the bill, had taken a check

of a person named Clark, as money, in satisfaction of the bill in question. It appeared that the defendant, Thomas Lawson, applied to a bill broker to procure the bill in question to be discounted for him. The bill broker was not infunds at the moment, but expected to be during the day, from the proceeds of another bill maturing that day. The proceeds of the bill maturing belonged to the plaintiff, and the bill broker spoke to him, asking whether he would take the bill in question, and he assented, provided the parties to it were good. The bill which the broker expected to be paid that day was not paid in money, but was proposed to be paid by check on the Commercial Bank, drawn by one of the parties to that bill, which the broker would not receive unless marked by the bank as good. This occurred after banking hours, so that the check could not be marked that day. The broker stated that he had no objection to receive the check, if the defendant would take it in discount of the bill proposed to be discounted. The check was shewn to defendant, Thomas Lawson, and he took it, and being for a larger sum than the bill in question, he paid the difference to the broker. broker the same day paid the difference to the giver of the check, and handed the bill in question to the plaintiff as his property. Thomas Lawson paid the broker his charges for negotiating the bill. The check was never paid, and several attempts were made subsequently by Lawson to obtain payment of the check from Clark. Evidence was given on the part of the defendant to shew that the broker requested Lawson to take the check and hold it, and that it should be made good or that he would see it made good. The broker, however, represented that the defendant took the check upon his own responsibility.

The learned Chief Justice directed the jury that the question for them to consider was, whether the check was accepted by Lawson in satisfaction, or as so much money for his bill, or whether he accepted it to present at the bank, and if not paid to return it; and he remarked that, if the broker was to be believed, his account of it was reasonable and natural, and it such case the plaintiff was entitled

to recover. The juty found for the plaintiff the amount of the bill and interest.

McMichael moved for a new trial on the law and evidence, and for misdirection, and reception of improper evidence. He contended that the jury should not have been told that if they believed the broker the plaintiff was entitled to recover, but that the case should have been left to them without such remarks—He cited Owenson v. Morse, 7 T. R. 64.

He also filed an affidavit of the defendant, Thomas Lawson.

Burns, J.—Upon a careful examination of the evidence, it is quite clear the verdict is in accordance with the justice of the case. This is the second time this case has been tried, and on the former occasion the verdict was the other way upon the same evidence, and this court set that verdict aside (a). The account of the manner in which the bill in question was discounted for the defendant, Thomas Lawson, was very natural. Lawson had similar transactions with the broker before, and when he applied for discount of the bill in question was asked whether he would take Clark's check and pay the difference, as the check exceeded the amount of the bill, which he agreed to do. His own bill was upon time, and the check due at once, and so far it was an exchange of one security for another. The affidavit of the defendant now filed does not propose to prove any other fact than already proved, and only denies to a certain extent the evidence of the broker. The evidence given by the broker seems the most reasonable account of the matter, when taken in connection with what occurred afterwards on the part of the defendant, and which matters the defendant does not deny ia his affidavit. When it was found that the check would not be paid by the bank, the defendant might have had other security for the amount, but he seems to have preferred holding the check in the expectation that the giver would provide for its payment. With regard to the misdirection complained of, it is a common mode of putting a case to a jury to say, if such a witness is to be believed, then the jury should find a certain way, leaving of course the credit to be

⁽a) Not reported.

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given to the witness to the jury. Now, upon seeing what the witness has sworn, we must say, the jury having found he did swear truly, that there can be no question the plaintiff is entitled to recover the amount of the bill, and that the check the defendant took was a satisfaction for it. The defendant's affidavit by no means removes that conviction. There was no misdirection or reception of any improper evidence, and the verdict must stand.

Robinson, C. J.—The strong evidence given on the trial that the defendant, Thomas Lawson, agreed to take the check in question as so much money, was strengthened much by the very nature of the transaction, for it was not the plaintiff, through his agent the broker, offering his own check as a payment, but it was the plaintiff, through his agent, telling the defendant, "I can discount this bill if you will take this check,"-i.e. the check of a third party, Clark-"as money," giving in fact one security for another; and besides what the broker swears he did is precisely what any man of ordinary business habits and knowledge would have done under such circumstances as he stated. The giving back the £30 in money when the check was taken, is in itself a strong proof that the defendant had no hesitation in accepting it; but the evidence of the broker on that point, unless it be disbelieved, removes all doubt.

DRAPER, J., concurred.

Rule discharged. (a)

IN RE ASKIN AND CHARTERIS.

Coroner's inquests-Allowance to medical witness-13 & 14 Vic. ch. 56, sec. 7.

A medical witness, in obedience to the coroner's summons, attended during two inquests held on fifty-two persons killed by a railway accident, and occupying several days; no post mortem examinations were made. Held, that under the statute he could be allowed only 25s. for each day's attendance, (not for each body,) together with his mileage in travelling.

In Easter Term last, C. Robinson obtained a rule nisi calling upon the treasurer to shew cause why a mandamus should not issue commanding him to obey an order made by

Edmund B. Donnelly, a coroner for the county of Kent, and in pursuance of such order to pay to Dr. Askin £66 8s. for fees due him for attendances and medical services, rendered as a medical practitioner and witness upon an inquest held by the coroner on the 27th of October then last, and following days.

McCrae shewed cause, and filed affidavits in reply to those put in in behalf of the applicant. He objected also that a mandamus would not lie in such a case.

The court, after taking time to consider, overruled this objection, on the authority of the case of Regina v. The Treasurer of Oswestry, 12 Jur. 744, 12 Q.B. 239, and granted a mandamus nisi.

In Trinity Term the treasurer returned to this writ that he had tendered to Dr. Askin £3 18s. for his services on the occasion referred to, which was the whole amount due according to the statute, and which sum the said Askin refused to accept, as being insufficient.

C. Robinson, for the applicant. D. B. Read, contra. The facts of the case are fully stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The question which is intended to be brought up in this return is, whether Dr. Askin, the surgeon who attended the coroner's inquest, is entitled to the fee of 25s. mentioned in the statute 13 & 14 Vic. ch. 56, sec. 7, for each one of the fifty-two bodies brought before the jury upon the coroner's inquest on the occasion referred to.

The coroner considering that Dr. Askin could legally claim the fee of 25s. in respect of each body, in addition to 28s. for travelling twenty-eight miles to attend the inquest, made his order upon the county treasurer to pay him £66 8s.

The treasurer, acting, as we may suppose, under the direction of the justices, has refused to pay that order; his objection being that under the circumstances the surgeon is only entitled as for two attendances at 25s. each, and 28s. mileage.

The provision in the statute is, that where any legally qualified medical practitioner has attended upon a coroner's inquest in obedience to any order of the coroner given under the statute, he "shall receive for such attendance, if without a post mortem examination, £1 5s.; if with a post mortem examination, without an analysis of the contents of the stomach or intestines, £2 10s.; if with such analysis, £5, together with 1s. per mile for each mile he shall have to travel in going to and returning from such inquest." And the act directs that the coroner shall make his order on the treasurer of the county for the payment of such fees, and that the treasurer shall pay to the coroner the money mentioned in the order.

The coroner has in this case made an order in favour of the surgeon for £66 8s. upon the principle I have stated; and it has been contended that the order is conclusive upon the treasurer, who has nothing to do but obey it,—the direction in the statute being express to that effect. But we cannot accede to that; for then, if the coroner, in disregard of what the statute allows, were to give an order in favor of a medical practitioner for £100 for his attendance upon a single inquest and examining one body, the treasurer would be bound to pay it.

Whether the treasurer would be safe in paying the coroner's order, provided it did not clearly appear upon the face of it to be illegal, is one question. It is quite another question whether, when he declines to pay it, we should apply the prerogative process of a mandamus to compel his compliance with an order which we may see to be illegal.

The act only authorizes the coroner to make his order upon the treasurer for the payment of such fees as are mentioned in the act, and if he has given an order for fees not warranted by the statute, we should certainly not interpose to compel their payment.

The circumstances of the present case it appears are these: By an unhappy collision between two trains on the Great Western Railway, fifty-two persons were killed. An inquest was immediately holden, not, as we may suppose, because any one could doubt what was the cause of the death of the parties, for that was sufficiently apparent, but in order to receive and record evidence as to the cause of the collision, so that it might be known whether any one was criminally liable.

The coroner, with the jury first summoned, commenced

holding the inquest on the 27th of October, and continued it day by day till the 4th of November following, the surgeon, Dr. Askin, being in constant attendance upon the inquest for seven days.

That jury, being unable to agree upon a verdict, was discharged, and the coroner summoned a new jury, which sat two days and then returned a verdict, and upon that second inquest Dr. Askin also attended both days, and was examined as a witness.

This is the coroner's account of the matter, given in an affidavit made by him, in which he states that Dr. Askin necessarily travelled twenty-eight miles to give his attendance; that he gave him the order, the propriety of which is now in question, "under and by virtue of the statute, and as he considered himself justified in doing by reason of the statute, and of Dr. Askin's continued and valuable services." And that the said inquests were held upon the bodies of the several persons whose names are mentioned in the order (being fifty-two in number).

Dr. Askin in his account delivered in against the county, charges "for attending an inquest in obedience to a summons from the coroner during the 27th, 28th, 29th, 30th, and 31st of October, and the 1st, 2nd, 3rd, and 4th of November, 1854, held upon the bodies of Nathaniel Oaks," &c., enumerating the whole number.

Then we have an affidavit from the foreman of the jury first impannelled, who swears that Dr. Askin lives fourteen miles from the place where the inquest was holden; that he merely assisted the jury in examining the bodies, for the purpose of securing what money and valuable effects might be found upon them; that on the day after the jury were impannelled and this examination completed, all the bodies of the persons then dead (47) were interrred; that the jury continued their sittings for six days, during which time Dr. Askin was examined twice as a witness, for the purpose of ascertaining if possible upon whom the blame of the accident rested, and not for ascertaining the cause of the death, which was apparent to all, though he was asked whether he had any doubts on that point; that there was no post mortem examination of any of the bodies; that Dr. Askin was not

summoned in consequence of any requisition of the jury; that the first jury not agreeing, a second was called; that one body was exhumed in order that the jury might have a view, and that they gave in their verdict on the second day.

We are of opinion that the liberal view taken by the coroner of Dr. Askin's claim cannot be sustained; for Dr. Askin did not in fact attend upon fifty-two coroner's inquests, and the statute does not say that the surgeon shall be paid 25s. in respect of each body upon which the inquest shall be holden, but 25s. for his attendance upon a coroner's inquest.

If Dr. Askin had been called upon to make a post mortem examination of one or all of the bodies, he would have been entitled to his fee for that service in respect of each one of the bodies upon which that operation was performed.

But here all that he did was, to attend the inquest while it was sitting, or rather the two inquests, and to answer any questions that were asked him upon his inspection of the bodies.

The statute does not provide a fair scale of charge for such a case, the legislature evidently assuming that the attendance would usually occupy but a portion of a day, and would not extend, as in this case it did, over several days.

Anything that we could recommend to be allowed, consistently with the act, would really not be an adequate compensation for the loss of time by a medical man. intimated in the argument that whatever we thought could be legally allowed would be readily paid, without waiting for the compulsion of a mandamus. We are not surprised that it should have appeared to the treasurer that £3 18s. was all that the act authorized, being 25s. for each of the two inquests and 28s. for mileage; but it appears to us that it would be no strained construction of the statute to treat each day's attendance of the surgeon as a separate attendance, entitling him to 25s. This would make the charge for the nine days' attendance £11 5s., and with the 28s. for mileage the whole charge would be £12 13s., which would be by no means an adequate compensation to a medical man for leaving his practice and maintaining himself from home. But beyond that we think it impossible to go, consistently with the statute.

I will only add, that there are numerous instances of an inquest being holden over several bodies, which circumstance does not make it the less one inquest.—Umphreville on Coroners, 2nd vol. 486-7, 490.

HILL V. THE ONTARIO, SIMCOE, AND HURON RAILROAD UNION COMPANY.

Management of locomotive—Escape of sparks—Care required in preventing.

Railway companies, in the management of their engines, are bound only to use the ordinary and regular care and appliances to prevent the escape of sparks.

Any property so near the track as to be in danger, notwithstanding such precautions, remains there at the owner's risk; and they are not obliged

to shut off steam, or take extraordinary care, in passing it.

CASE.—The declaration complained that the defendants so carelessly, negligently, and improperly managed and conducted a locomotive upon their railway, that in passing the plaintiff's premises his barn was destroyed by fire caused by sparks emitted from the engine.

The defendants pleaded the general issue by statute.

At the trial at Toronto, before Robinson, C.J., it appeared that the plaintiff's barn was within a few feet of the track of the railway, and that on the 24th of April last, a few minutes after the passenger train had passed the plaintiff's barn, about 5 p.m., going to the north, the barn was seen on fire. Evidence was adduced on the part of the plaintiff to shew that there was no bonnet or hood to the funnel of the pipe of the engine upon the occasion, and it was contended that it was the duty of those in charge of the engine, in passing places where there might be combustible matter, such as straw lying in the barn-yard, which was the case in the present instance, to shut off the steam, and thereby prevent the emission of sparks. On the part of the defendants it was proved that the engine in question, on the day of the barn being destroyed, was fitted with all the usual and requisite appliances for the prevention of such accidents as complained of. The learned Chief Justice told the jury that the plaintiff had a right to use his barn and barn-yard as farmers generally use them, and that if he chose to allow it to remain near the track he must submit to the risk which would exist as a consequence of the Legislature having entrusted the defendants with an agent of a dangerous character, provided they used all the appliances and precautions which could be expected reasonably from them. The jury, upon this charge and upon the evidence, found a verdict for the defendants.

Boyd moved for a new trial, on the ground that the jury should have been directed that the persons in charge of the locomotive should, in order to avoid the possibility of an accident, in addition to using the ordinary appliances for prevention of the emission of sparks, have shut off the steam of the engine while passing the plaintiff's premises.

Cur. adv. vult.

BURNS, J., delivered the judgment of the Court.

We are of opinion there should be no rule, for we think the Chief Justice left the case to the jury in the only way it could be left to them. As Chief Justice Tindal says, in Piggot v. The Eastern Counties Railway Co. (3 C. B. 229)-"The defendants are a company intrusted by the Legislature with an agent of an extremely dangerous and unruly character for their own private and particular advantage, and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes." The question is not that the defendants are liable for all the consequences in every event which may follow the use of a dangerous agent sanctioned by the Legislature: but it is, whether the defendants have used all reasonable precautions and appliances to prevent accidents. is no doubt of the general principle, that every individual and company must so use his or their property as not to occasion injury to others; but when the Legislature has sanctioned the use of an extraordinary agent, then the principle must be qualified by the usages and appliances of science, and that must be governed also by the object of the matter which has been so sanctioned by the Legislature. In the present case the use of the ordinary appliances of science to prevent the emission of sparks was proved to the satisfaction of the jury, for they found for the defendants. The object of the Legislature in sanctioning the use of a dangerous agent, such as a locomotive, to transport passengers upon a railway, could not be that the company would be bound to adopt a speed which might avoid entirely all danger from emission of sparks. If the plaintiff has a right to say that in passing his premises the defendants are bound to shut off the steam to prevent the emission of sparks, then it must follow that every person along the whole line of the railway who chose to build near the track, upon the principle that each person in the use of his property is bound not to injure his neighbour in the use of his property, would have the same right, and the use of the railway might in consequence be very much impaired. It is quite clear that it must be considered the Legislature intended the railway should be used for the public benefit, even though some individual interests might suffer; and if the defendants use all the precautions which can be reasonably expected from them, though using the railway for their own private and particular advantage, yet that is all that can be expected. We must suppose the Legislature contemplated the rights of all parties when they sanctioned the use of such an agent as a locomotive steamengine for the transportation of passengers and goods. the defendants were bound to shut off the steam because the plaintiff's barn was near the track, then the owners of lands through or near which the railway passes along the whole line might claim the same privilege whenever they chose to erect anything which might be hazardous. The true view of the subject seems to be this: not that the company is bound to adopt such a care as to prevent any accident, but that if the property of an individual is so situated as to be subject to the risk of ordinary care on the part of the defendants in the use of such an agent as a locomotive steam-engine, he is subject to what the Legislature has subjected him to; and if he chooses, after the railway is constructed, to incur a risk, he does so voluntarily, and cannot complain. It would not be reasonable to expect that the defendants should be bound to do what the plaintiff contends for in this case, and therefore there should be no rule.

Rule refused.

Young v. THE GRAND RIVER NAVIGATION COMPANY.

Assessment of damages—Allowance for future injury.

At an assessment of damages the plaintiff's evidence went exclusively to shew injury caused by the giving away of dams and embankments, alleged to have been wrongfully and unskilfully put up by defendants. About two acres of land were washed away, which his witnesses valued at from £20 to £30 an acre. They also swore that the whole estate was further damnified, and one said to the extent of £50, which he stated was for the probability of future injury; others, however, valued the damage at a far greater sum. The jury having assessed the damages at £100,

far greater sum. The jury having assessed the damages at £100, Held, that the court could not assume that any part of this was for future damages, the judge having told the jury not to allow for that; and they

therefore refused to interfere.

This was an assessment of damages, upon the judgment on the demurrer to all the counts on the declaration except the last, the judgment of this court in favour of the defendants on the demurrer having been reversed in error as to the former counts (a). The plaintiff's evidence went exclusively to shew damages from the washing away of his land, through the giving way of the dams and embankments charged in the declaration as wrongfully and injuriously erected, and as put up and constructed without reasonable skill, care, and diligence. Somewhere about two acres of land were washed away, which the plaintiff's witnesses valued at from £25 to £30 per acre, though it appeared from the evidence of defendants that when the banks were about being constructed, or during the progress, the plaintiff had desired the defendants to increase the quantity of land taken by them, and had agreed upon £10 per acre as the price. The plaintiff's witnesses also stated that in their opinion the place—i. e., the whole estate of the plaintiff—was further damnified, as one of them said, to the extent of £50, which additional sum, he stated, was for the probability of future damage. Two others valued the damage at a sum far beyond that. The jury assessed the damages at £100.

Connor, Q. C., moved to set aside this assessment, on the ground that the sum given was excessive; or on the ground that future contingent damages were included by the jury; unless the plaintiff would consent to reduce the sum either to 1s. or to £50.

Martin shewed cause, contending that the diminution in value of the whole estate, and not the mere value of the

⁽a) See the decision in this court, 12 U. C. R. 75. The judgment in Appeal is not yet reported.

portion injured, was the proper measure of compensation. He cited Hosking v. Phillips, 12 Jur. 1030, reported also in 3 Ex. 168; Jones v. Gooday, 8 M. &. W. 146; Howell v. Young, 5 B. & C. 267, per *Holroyd*, J.; Hodsoll v. Stallebrass, 11 A. & E. 301; Glover v. North Staffordshire R. W. Co., 16 Q. B. 912; Day v. Holloway, 1 Jur. 794. That when there is no certain measure of damages the court will not in general disturb a verdict.—Mayfield v. Wadsley, 3 B. & C. 357; Brewer v. Drew, 11 M. & W. 629.

ROBINSON, C. J., delivered the judgment of the court.

We think that we must allow the verdict in this case to stand. It is clear no doubt, that the jury could not properly allow damages for a future possible inroad upon the plaintiff's land by freshets which may occur, and upon the ground that if they do occur they may do the plaintiff more injury than they otherwise would, in consequence of the dam which the defendants have erected. But the learned judge told the jury that they were not to allow for a contingent future injury of that kind; and though we may apprehend that they may notwithstanding have suffered it to enhance the damages, we can hardly assume that they did, and grant a new trial on that account, because several witnesses swore that in their opinion the plaintiff had sustained an actual damage much beyond the £100 which the jury had given. We think certainly that the verdict is rather extravagant, but we could not on that account set it aside, unless on payment of costs, and it is questionable whether it would be of advantage to the defendants to take a new trial on that ground. We must look upon the verdict of a jury, we think, in much the same light in this kind of case as we should upon an award of arbitrators, and the excess should be of large amount, or palpably or certainly unjust, before we should interfere on that ground only.

If it were reserved to us to say whether a certain portion of the damage that had confessedly been allowed for future contingent damage should be struck out of the verdict or not, we should have no difficulty in determining against the allowance. But as the case stands, we think we must discharge the rule.

JOHNSON V. LAMB.

Detinue—Goods seized in defendant's hands before trial, on execution against plaintiff, and redeemed for plaintiff—Action pressed notwithstanding—Order thereupon.

Detinue for a watch and chain. At the trial it appeared that the defendant had obtaind possession of the things by redeeming them at the plaintiff's request from a person with whom they were pledged, and that he had refused to give them upon payment of the money so advanced, claiming to retain them for a further sum due him by the plaintiff for board. A verdict having been found for the full value of the articles, it was shewn on application, by affidavits, that before the trial defendant had obtained execution against the plaintiff for this sum in the Division Court, under which the bailiff, by the plaintiff's directions, had seized this watch and chain in the defendant's possession; and that to prevent their being sold, the plaintiff had procured some one to advance the money on being allowed to retain them as security.

Held, that under such circumstances this action should not have been proceeded with; and ordered that there should be a new trial without c sts, unless the plaintiff would reduce his verdict to nominal damages; and

that he should in either case pay the costs of this application.

This was an action of detinue, for one gold watch of the value of £20, and one gold chain of the value of £10.

The declaration alleged a bailment by the plaintiff in the usual form, to be redelivered, &c., on request, and that the defendant hath not yet delivered the said goods, &c., or any of them, &c., but unjustly detains the same from the plaintiff, to his damage of £30.

Plea, that the defendant doth not detain the said gold watch and gold chain, or any of them, &c., in manner and form, &c.

At the trial it was proved that the plaintiff had brought out from England the gold watch and chain, the gift of a sister; the watch cost in England £11 sterling, and the chain £3; that the plaintiff had pledged the watch and chain with a third party for seven dollars, after arriving in America, and that the defendant had at his request advanced the money, and redeemed the watch, retaining it until the plaintiff should repay him; that the plaintiff afterwards, in Toronto, tendered the seven dollars to the defendant, who refused to accept it and give up the watch, alleging that the plaintiff was indebted to him also in about £10 for board, and claiming a right to detain the watch and chain till that demand was paid.

At the trial at Toronto, before Robinson, C. J., it was proved by one of the plaintiff's witnesses that since this action was brought the plaintiff told him that the watch was

in the possession of his (the plaintiff's) attorney, who was only going on with the action in order to make the defendant pay the costs of the suit.

The plaintiff's attorney was in court, but was not called on the part of the defendant, though he emphatically declared that he had not the watch, and altogether denied the truth of the evidence.

The learned Chief Justice directed the jury that the question upon the pleadings was, whether before and up to the time of action brought the defendant did wrongfully detain the plaintiff's watch and chain: that if he did, then the jury should find for the plaintiff; and he directed them also to find the value of the watch and chain, in order that execution might go for damages, if the defendant should not move to stay proceedings on giving up the articles. He recommended also that the full value should be given, in order that the defendant might find it to be his interest to give up articles on which the plaintiff might naturally set a particular value. He told the jury that if the plaintiff's attorney had the articles in his possession since this action was brought, that might furnish ground for an application after verdict, and might be material upon the question of what costs the defendant should be made to pay; but that it would not be material as to the finding upon the issue joined. He observed that it had not been proved that the defendant had given the watch and chain into the hands of the plaintiff's attorney, with authority to give them up to the plaintiff, which the jury should be satisfied of before they could say that the defendant had redelivered them.

The jury found for the plaintiff, and that the value of the watch and chain was £30. They said they could not concur in finding that the watch and chain had been redelivered, because some of them were of a contrary opinion.

Wilson, Q. C., for the defendant, obtained a rule nisi for a new trial, on the law and evidence, and for misdirection; or that the verdict as to £30 damages should be altogether struck out, or be reduced, because the articles had been restored to the plaintiff soon after the commencement of this suit.

McIntyre shewed cause, and cited Richards v. Frankum, 6 M. & W. 420; Mason v. Farnell, 12 M. & W. 674; Ch. Arch.

Prac. 838; Phillips v. Hayward, 3 Dowl. 362; 1 Harr. & Wool. 108, S. C.

Wilson, Q. C., in support of the rule, cited Williams v. Archer, 5 C. B. 318; Pawly v. Holly, 2 Bl. Rep. 854; Anderson v. Passman, 7 C. & P. 193; Barker v. Braham, 3 Wils. 374.

The facts disclosed in the affidavits are set out in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The question, upon the only plea that was upon the record—namely, non-definet—was, whether at the time of the action, or at most of the plea pleaded, the defendant was detaining the goods. If pending the suit, or after plea pleaded, the goods had been redelivered to the plaintiff, that should have been pleaded, as in Crossfield v. Such (8 Ex. 159).

But, admitting that the jury could properly have found a redelivery of the goods, although there was no plea of redelivery on the record, under the authority of the case cited, of Williams v. Archer (5 C. B. 318), the difficulty in this case is, that upon that question of fact being left to the jury, they declared themselves unable to say that the articles had been redelivered to the plaintiff, because they were not unanimous on that point. I had told them that the delivery of them to the plaintiff's attorney might or might not amount to a delivery to the plaintiff, according to the circumstances, which were not shewn.

The plaintiff's attorney was present, and the defendant would not call him as a witness, and he protested vehemently that it was not true that the goods had been redelivered to him; from which I inferred at the trial either that they had never been placed in his possession, or not with authority from the defendant to surrender them to his client, and I suppose the jury felt the same doubt upon that point.

It turns out now, upon affidavits filed on the one side, and not disputed on the other, that the facts were as follow, and that the defendant expected to be able to prove them at the trial, but was disappointed by the non-attendance of his witness:—

The defendant persisting in his claim against the plain-

tiff for his board, sued him for it in the Division Court, and obtained judgment for £10, and took out execution. The plaintiff directed the bailiff, when he called with the writ, to go to the defendant and seize his watch and chain, which he said the defendant had in his possession, and the bailiff did so; and it appears that in order to prevent them from being sold under the execution, the plaintiff's attorney found some one who advanced the money for the plaintiff, on his being allowed to retain the watch and chain as security for repayment.

Under such circumstances the action should not have been proceeded in, certainly not with any view of obtaining a judgment for the delivery of the articles, or the payment of their value. Unless, therefore, the plaintiff will consent to reduce his verdict to nominal damages, we grant a new trial without costs; and in either case the plaintiff must pay the costs of this application, to which the defendant has been driven by the real facts of the case being improperly kept out of view.

IN RE THE BOARD OF SCHOOL TRUSTEES OF THE INCOR-PORATED VILLAGE OF GALT AND THE MUNICIPALITY OF THE VILLAGE OF GALT.

Duty of municipality to raise money on request of trustees—Mode of proceeding by trustees—13 & 14 Vic. ch. 481, secs. 24, 25, 26—16 Vic. ch. 185, sec. 1.

The school trustees of an incorporated village applied to the village municipality to levy a sum of money required to pay for a school site which they had contracted to purchase. The municipality refused to do so, and the trustees applied for a mandamus. It did not appear that the trustees had appointed a secretary-treasurer, if they are empowered to do so by the 16 Vic. ch. 185, secs. 1, 6.

Held, that the trustees should first have given an order to the person from whom they had agreed to purchase upon the treasurer of the municipality,

and on this ground the application was refused.

Quære, however, whether a mandamus would have gone, independently of this objection.

In Trinity Term last D. B. Read obtained a rule calling on the Municipality of Galt to shew cause why a writ of mandamus should not be issued against them, commanding them to levy or cause to be levied £750, required by the said Board of School Trustees for the purchase of, or to pay for, a school site and premises in the incorporated village

of Galt, or for the payment of the school site and premises already purchased by the said Board of School Trustees in the said village from J. Harris.

From the affidavits and papers filed in support of the rule, it appeared that on the 17th of August, 1855, a notice was served on J. Davidson, Esq., reeve of the municipality, by the solicitor for the Board of Trustees, that he was retained to institute prodeedings to enforce the raising of money or other means to fulfil the engagement entered into by the Board of Trustees and Mr. James Harris for the purchase of a lot as a school site; and "you will please take notice and govern yourselves with respect to your assessments and actions accordingly." No direct answer was given to this notice; but the reeve, on the 22nd of August, informed the solicitor verbally that the Municipality would take no step towards raising the money unless compelled so to do.

On the 29th of March, 1855, P. Cook, the secretary of the Board of School Trustees, addressed a letter to the reeve and council of the Municipality, stating that the Trustees had bargained with Mr. James Harris for a lot of land containing 2 acres and 5 perches, for £750, payable as follows: cash to be paid on the execution of the deed £225, less £25, which Mr. Harris gave for school prizes; the balance, £525, payable in four equal annual instalments, with interest, giving to Mr. Harris at the same time ample security for the payment of the balance, and interest; and according to the School Act of 1850, sec. 24, sub-sec. 6, confirmed by the Act of 1853, laying before the Municipality the foregoing statement, and requesting the Municipality to make provision for carrying out the arrangement.

On the 26th of April, 1855, Mr. Cook, pursuant to a resolution of the Trustees, requested a reply to the letter of the 29th of March, inquiring whether it was the intention of the council to make provision for the payment of the school site purchased from Mr. Harris.

On the 9th of May, 1855, the clerk of the Municipality transmitted a copy of a resolution as follows: "That the council do make such provision as may be necessary to enable the Trustees to redeem their engagements with Mr. Harris,

but are opposed to the idea of central schools in this village at present; would therefore recommend that the said lot be placed at the disposal of the council, and purchase a lot on the west side of the river for additional schoolhouse accommodation, which, with an outlay of £500 or £600 along with the present schoolhouse, would be accommodation for a number of years."

By memorandum of agreement, under the seal of the corporation of the School Trustees and of James Harris, dated the 21st of June, 1855, Harris agreed to sell, and the trustees agreed to purchase, a piece of ground in Galt (described), containing 2 acres and 6 perches, for £750, payable as follows: £25 to be appropriated as prizes to the pupils attending the common schools for the school to be built on the property; the balance, £725, with interest from the 26th of March, 1855, to be paid on the signature of the deed, barring right of dower, subject to a discount of £7 10s. on payment as aforesaid; the payment and the completion of the transfer to be made on or before the 31st of October, 1855.

On the 9th of August, 1855, Mr. Cook, by direction of the Board of Trustees, addressed a letter to the Municipality to ask whether, "in view of the rejection by the rate-payers on the 4th instant of the by-law for issuing debentures to the amount of £750 to pay for the school lot purchased from Mr. Harris, and for which the Board is under sealed engagements, it is still the intention of the Council to raise that sum by assessment this year in the ordinary way, and within the ordinary time of collecting the assessments, or to raise it by some other means."

On the 11th of August, 1855, the Municipality clerk, by way of reply, sent to Mr. Cook a copy of the resolution following, passed the preceding evening: "Resolved, that the council refused to raise the sum of £750 to pay Mr. Harris for the lot of ground purchased by the School Trustees for erecting thereon a central schoolhouse, in consequence of the qualified electors of this Municipality objecting by a majority of votes to sanction the Council passing a by-law to raise the said amount by debentures for that purpose."

The affidavit of Peter Cook, secretary of the Board of Trustees, verified all the foregoing papers, and stated that a verbal agreement between the Trustees and Harris was entered into before the 29th of March, containing the same terms as were afterwards reduced to writing by the agreement of the 21st of June, 1855.

In this term M. C. Cameron shewed cause. He filed the affidavit of John Davidson, reeve of the Municipality of Galt, setting forth that no common school meeting had been called by the Board of School Trustees to consider the steps to be taken by said Trustees for procuring a school site on which to erect a new schoolhouse. He referred especially to the letter of the 29th of March last, containing the terms of the original agreement, and stated that on the 13th of April last, a conference took place between the Trustees and the Village Council, when the Trustees intimated that they should require over £1000 to build a schoolhouse: that in consequence of these proceedings a large meeting of the rate payers of the Municipality was holden on the 23rd of April, at which a resolution was passed by a large majority," That it is unwise, unnecessary, and inexpedient to expend a large sum of money in buying a school site and building new schools this year, and that this meeting do recommend to the Council that they do not assess this year for either or any of the purposes requested by the School Trustees in their late letter to the That the Village Council, assuming that the school Trustees were liable to Harris for the completion of the agreement, proposed a by-law, whereby the said sum of £750 might be raised by debentures, and be payable over a period of years; but when this by-law was submitted to the rate-payers (about the 9th of August last) they demanded a poll, and on taking the poll the by-law was lost, and the Municipality was unable to raise the sum by loan; and in consequence of this expressson by the rate-payers, the Council feltbound to decline inserting in the annual by-law a sum to cover the purchase money of the school site: that the agreement of the 21st of June, 1855, was entered into after the resolution of the rate. payers at the meeting held on the 23rd of April: that the Municipality have passed a by-law for the payment of the teachers' salaries and the incidental expenses of the Board of Trustees for the current year, ending the 31st of December, 1855.

D. B. Read tendered further affidavits by way of reply to those filed on shewing cause, which the court refused to receive.

DRAPER, J.—Incorporated villages were erected, and provision was made for the erection of others, by 12 Vic. ch. 81, sec. 52. They appear to have been overlooked in the school act of the same session (ch. 83), which makes provisions as to the several townships, towns, and cities in each county.

The act 13 & 14 Vic. ch. 48, sec. 25, provides that the municipality of every incorporated village shall possess and exercise all the powers, and be subject to all the obligations with regard to the levying and raising of moneys for common school purposes, and for the establishment and maintenance of school libraries, which are conferred and imposed by the act upon the municipal corporations of cities; and it provides for the election of six school trustees, at a meeting of the taxable inhabitants of the village—the trustees to be resident householders. Sec. 26, provides, that the trustees shall be a corporation, and shall possess all the powers and be subject to all the obligations, within the limit of such incorporated village, which are conferred and imposed by the 24th section on the trustees of cities and towns. These powers, so far as they apply to the present case, are-To do whatever they may judge expedient with regard to purchasing or renting school sites and premises; building, repairing, furnishing, warming, or keeping in order the school house or school houses. To determine the number, sites, kind, and description of schools which shall be established and maintained in such city or town. To prepare from time to time, and lay before the municipal council of such city or town, an estimate of the sum which they shall judge expedient for paying teachers' salaries-for purchasing or renting school premises-for building, renting, repairing, warming, furnishing, and keeping in order the school houses and their appendages and grounds-for procuring suitable apparatus and text books for the schools-for the establishment and maintenance of school libraries, and for all the necessary expenses of the schools under their charge; and it shall be the duty of the council to provide such sums in manner as shall be desired by the board of trustees.—To levy at their discretion any rates upon the parents or guardians of children attending any of the schools under their charge, and to employ the same means for collecting such rates as trustees of common schools may do under the 12th section: provided that all moneys thus collected shall be paid into the hands of the chamberlain or treasurer of such city or town, for the common school purposes of the same, and shall be subject to the order of such trustees; to give orders to teachers and other school officers and creditors, upon the chamberlain or treasurer, for the sums which shall be due them.

There is a difference to be noted between the powers of the trustees of school sections in townships and in cities, towns, and incorporated villages. In townships, the school trustees are to apply to the municipality of the township, or to employ their own lawful authority, as they may judge expedient, for the raising and collecting of all sums authorized. And they are to appoint a secretary and treasurer, who is to receive all school moneys, and to disburse such moneys as directed by a majority of the trustees. In this respect, the city, town, or village trustees, have not the same power as the trustees in township school sections, to raise and collect money by their own lawful authority. In another respect their power is greater-viz: as to purchasing school sites or premises, a power vested in the township council, by the 18th section, firstly. Then again in cities, towns, and villages, the school trustees have no treasurer. There is another remarkable difference between the powers of the two boards of trustees. In cities, towns, and incorporated villages, such boards are not restricted in the exercise of their powers by the necessity of reference to a majority of the freeholders or householders.—See sec. 12, 7 thly.

The powers of the municipal council of the incorporated village, and for obligations, are the same as those conferred upon the township and the county councils; both are united;

but it must be borne in mind, that in townships the councils are directed to levy for the purchase of a school site, the erection, &c., of a school house, &c., such sum as shall be desired by the trustees of the school section on behalf of the majority of the freeholders or householders at a public meeting called for such purpose as provided by the 12th section: provided that such municipality may grant to the trustees of any school section authority to borrow any sum which may be necessary in respect to school sites, &c., and cause to be levied upon the taxable property in such section such sum in each year as shall be necessary to pay the interest, and to pay off the principal in ten years.

The 16 Vic. ch. 185, sec. 6, enacts that the trustees of each school section shall have the same authority to assess and collect school rates for the purpose of purchasing school sites and the erection of school houses, as they are now or may be invested with by law to assess and collect rates for other school purposes: provided they shall take no steps to procure a school site, or change the site of a school house, without calling a special meeting of the freeholders and householders; and provided that such trustees shall, whenever they impose any rate for school purposes, make a return to the clerk of the municipality of the amount of the rate so imposed by them.

Upon the best consideration I can give this section, I am of opinion that it applies only to the trustees of school sections in townships. Firstly, because the board of trustees in cities, towns, and incorporated villages, had already power to purchase school sites and build school houses.—

13 & 14 Vic. ch. 48, sec. 24, 3rdly. Secondly, that the proviso would (unless for section 1,) apply only to township school section trustees—(observe the distinction of corporate name—one is, "The trustees of school section No. ——, in the township of ———, in the county of ———," 13 & 14 Vic. ch. 48, sec. 10. The other is, "The Board of School Trustees of the city (or town) of ———, in the county of ———," 1b. sec. 24.) The Legislature keep up this distinction. In sec. 1 of 16 Vic. ch. 185, they speak of "The Board of School Trustees," and of "The trustees of each school section"; in section 6, the latter phrase is used.

The first section of this act, however, declares that the board of school trustees in each city, town, and incorporated village, shall, in addition to the powers with which they are now legally vested, possess, and exercise, as far as they shall judge expedient, in regard to such city, &c., all the powers with which the trustees of such school section are or may be invested by law in regard to each such school section.

This provision may give rise to much question. Can such board, if "they shall judge expedient," appoint a secretary and treasurer, to be clothed with the powers given to that officer by 13 & 14 Vic. ch. 48, sec. 12, and thereby virtually abrogate sub-sections 7 & 8 of sec. 24, of the same act? as to this, see also section 26. Again, if they take such powers as were possessed by the trustees of school sections, are they subjected to such limitations as were the trustees of school sections? Ex. gr. sub-sec. 7, to sec. 12 of 13 & 14 Vic. ch. 48.

It may perhaps be successfully contended, that it was in the opinion of the Legislature desirable that the local government of all common schools in townships should be vested in a board of trustees, as in cities, &c., (see 13 & 14 Vic. ch. 48, sec. 20); and that such boards should be more independent of the freeholders and householders or taxable inhabitants than the trustees of school sections were.

Again: considering the extended power of boards of school trustees, and of trustees of school sections, and reading them in connection with section 17 of the 16 Vic. ch. 185, are all the municipalities not prevented from levying for the purchase of a school site, unless the application is made to them before the 1st of August in each year, or does that restriction apply only to the township councils, and to applications by trustees of school sections.

The 21st section of the 16 Vic. puts both bodies of trustees on the same footing as to the appointment of one of themselves collector of school rates.

It does not appear that the board of school trustees have appointed a secretary or treasurer, if under the 1st section of 16 Vic. ch. 185 they are empowered so to do; in which case the school moneys must still be paid into the hands of

the municipal treasurer, and the board must give orders on him in favour of their creditors, for the sums which shall be due such creditors. Assuming all that has been done by the board of school trustees to have been rightly done, they have, by the agreement of the 21st of June, made Mr. Harris their creditor. They should, therefore, give him an order on the treasurer of the Municipality of Galt for such sum as they are liable to pay him. The duty cast upon the municipality is to provide such sums in such manner as shall be desired by the board of trustees. I do not construe this to mean thut this gives the board the power to determine whether the municipality shall raise the money by assessment or by loan, or by the appropriation of any fund at their command. "In such manner," I rather think, means at such times and for such particular purposes, as the trustees in their estimate point out; and I think the municipality might lawfully pay such orders out of their general fund, instead of either raising a loan or levying an assessment. If so, then until an order or orders have been given, and payment of them has been refused, we are not, I think, called upon to issue a mandamus, although the Municipality have in distinct terms refused to raise the required sum of £750 to pay Mr. Harris for the lot of ground purchased by the Board of School Trustees. If they refuse to make the payment when thus demanded, I do not say a mandamus may not go to order them to provide the necessary sums, if they excuse the payment for want of having them in hand; if they admit they are in funds, but refuse on some other grounds, it may be that a mandamus will not be the proper remedy to compel them.

Burns, J.—I do not see the way clear to grant the application. The 1st section of 16 Vic. ch. 185, in addition to the powers which the trustees of a city, town, or incorporated village have, gives the corporation all the powers with which the trustees of school sections were or may be invested, as far as the board of trustees of the city, town, or village, shall judge expedient. Now the trustees of school sections have power to appoint a secretary and treasurer to the cor-

poration, and a collector.—See 13 & 14 Vic. ch. 48, sec. 12; sub-secs. 1 & 2, and 16 Vic. ch. 185, sec. 21. No. 9 of the same section gives authority to the trustees, either to apply to the municipal council to raise and collect money, or employ their own lawful authority. The 6th section of ch. 185, 16 Vic., expressly gives power to trustees of school sections to assess and collect rates for purchasing school sites, and this provision by operation of the 1st section of the same act, applies to the Board of School Trustees in this This course is open to the applicants in this case, if they choose to adopt these provisions. It is not shewn to us whether the Board of Trustees have or not appointed a secretary, treasurer, or collector. If they have done so, a question then might be made whether they should not employ their own power to raise and collect what might be required, as being the more expeditious remedy, rather than take the course of applying for a mandamus to compel the Municipal Council to do so: that is, supposing the application, as in this case, to be a correct mode of applying to compel the Council to meet the engagements of the trustees .- See The Queen v. Gamble (11 A. & E. 69). If we take it in this case that the Board of Trustees have not availed themselves of the provisions extended to them, then the question is, whether they are the persons or body to make the application. The duty of the council, if that body be applied to, is under No. 1 of sec. 18, and under sec. 21, of the act of 1850, to levy such sums as desired by the trustees; and in such case the money levied would be paid into the hands of the chamberlain or treasurer of the city, town, or village. The board of school trastees discharge their duty, so far as the municipal council is concerned, by making the application to that body to levy the money required. No. 8 of section 24, imposes the duty on the board of school trustees to give orders on the chamberlain or treasurer, he being the proper custodier of the moneys, for such sum or sums as shall be due to creditors. The question therefore in this case is two-fold, whether the Board of School Trustees should not, after having requested the Municipal Council to levy the sum required, have proceeded to fulfil their duty, and give an order to the person from whom they purchased the school site, and then it would follow that he should apply for a mandamus to compel payment of the order if it were refused; or whether the Board of Trustees can come to this court before giving such order, and ask us to compel the Municipal Council to levy a rate to meet the orders they may afterwards give. I think they should fulfil their duty, presuming that other bodies will do theirs, and that an order should have been given to the person for payment of the purchase money of the school site. It does not follow as a matter of course, though the Trustees do ask and require the Municipal Council to levy a rate, that it is necessary to provide the funds by that means. It may be that the Council has surplus funds in hand to meet orders without levying any rate, and that it is unnecessary to levy any rate. The Board of Trustees discharge their duty by requiring the Council to provide the funds, and by giving their order to the creditor. The creditor can demand payment of the order, and enforce it if properly granted to him. If this shall cause any trouble or inconvenience to the Board of Trustees, it can be avoided by their exercising the power the Legislature has placed in their hands. Seeing that the Trustees can levy the amount they require on their own authority-and if they prefer taking the other course, seeing that it is their duty, as I think it is, to give their orders on the treasurer to the creditor-I think the order should be made before a complaint can be made to this court.

Robinson, C. J., concurred.

Rule discharged.

REGINA V. COKELY ET AL.

On an indictment for forcible entry and detainer of land, evidence of title in the defendant is not admissible.

The defendants were convicted at the assizes held at Barrie in September, 1855, before *Richards*, *J.*, of a forcible entry upon, and detainer of a lot of land in the township of Oro.

The counsel for the defence proposed to give evidence of title, or claim to title, by one of the defendants. The learned

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judge rejected this evidence, but reserved the point for the opinion of this court.

The Solicitor General, for the Crown, cited Rex v. Williams, 4 M. & Ry. 472. M. C. Cameron, contra.

Robinson, C. J., delivered the judgment of the court.

The case cited by the Solicitor General is a direct authority to shew that the evidence of title, or rather of semblance of title, was properly rejected by the learned judge. The conviction must be affirmed.

Conviction affirmed.

SAXTON V. RIDLEY.

Agreement—Construction of—Work to be commenced "so soon after the opening of navigation this spring, as," &c.—Right of action when made by plaintiff on behalf of company—Pleading.

Declaration upon an agreement by which defendant undertook to commence certain work "so soon after the opening of navigation this spring as he can remove a steam dredge and working apparatus to Port Burwell." Held, insufficient to allege only that the spring had elapsed; but that it was necessary to aver that since the opening of the navigation the defendant could have removed the dredge.

The agreement was made between the plaintiff of the one part, and the "President of the Port Burwell Harbour Company, on behalf of the said President, Directors, and Company of Port Burwell Harbour," of the other part, and under the seals of defendant and plaintiff. Held, that the plaintiff was entitled to sue in his own name.

The work was to be done at such places as should be pointed out by the plaintiff. Semble, that it should have been averred that he did point out such places, or asked defendant to go with him for that purpose, and was refused, not merely that he was ready and willing to point out.

DEBT upon an agreement under seal, alleged to have been entered into between the plaintiff and defendant, making profert, and setting it out in full in the declaration, as follows:

"This article of agreement and contract, entered into between Samuel C. Ridley, of the city of Hamilton, in the Province of Canada, contractor, of the first part, and Alexander Sexton, of the township of Bayham, in the County of Elgin, of the said Province, President of the Port Burwell Harbour Company, on behalf of the said president, directors, and company of Port Burwell Harbour, of the second part. Witnesseth, that for and in consideration of the conditions hereinafter mentioned, the said party of the first part doth contract and agree to dredge and excavate ten thousand cubic tons of earth or gravel matter out of the harbour at Port

Burwell, extending down to the depth of ten feet, at such place or places as may be pointed out by the said party of the second part, and to remove, carry, and deposit the same around to the east of the east pier, at and for the price and sum of thirty cents per cubic yard, the amount of said excavation to be ascertained by admeasurement in scows; and the said party of the first part doth agree to commence the work so soon after the opening of navigation this spring as he can remove a steam dredge and working apparatus to Port Burwell. And the said party of the second part, for and in consideration of the works hereinbefore contracted to be performed, doth agree to make monthly payments of one thousand dollars each to the said party of the first part from and after the commencement of the work, but in no case are payments to be made in advance of work being performed. To the due commencement and performance of the contract made, the said party of the first part doth bind himself, his heirs, executors, and administrators, in the penalty of two thousand dollars; and the said party of the second part binds himself and his successors in office."

"In witness whereof, the parties have hereunto set their hands and seals, this 29th day of March, in the year of our

Lord, 1855.

Signed, sealed, and delivered, in Duplicate, in presence of D. DROPE, LEONIDAS BURWELL.

SAML. C. RIDLEY, [L.S.] ALEX. SAXTON, President. [L.S.]

And the plaintiff avers that he hath been, and was at the date of said article of agreement, and continually thereafter during the whole of the spring of the year 1855, and to the commencement of this action, ready and willing to point out to the defendant the places in said Harbour of Port Burwell, at which the defendant should perform and do the dredging and excavating mentioned in said article of agreement that should be done by the defendant, of which the defendant during all that time had notice, and at divers days and times during the spring of said year requested the defendant to commence and perform the said work, which he had so contracted to do as aforesaid. And the plaintiff further avers that he hath at all times, since the said article of agreement was entered into and made, been ready and willing to pay

the defendant for the said work so to have been performed by him, as he, the plaintiff, had contracted as aforesaid to do, of all which the defendant continually thence hitherto had notice; and before the commencement of this action the spring of said year had elapsed. Yet the plaintiff avers that the defendant did not, at any time at or after the making of the said article of agreement, and thence hitherto, commence or perform the said work which he had so by the said article of agreement contracted to do as aforesaid, or any part thereof, whereby an action hath accrued to the plaintiff to demand and have of the defendant the sum of two thousand dollars, (equal to the sum of five hundred pounds of lawful money of Canada) in the penalty clause of said article of agreement mentioned, &c.

Demurrer, on the following grounds: First-that in and by the said declaration it appears that Alexander Saxton is the plaintiff in the action, whereas the article of agreement recited in the declaration, and upon which the plaintiff solely bases the right of action, discloses no contract between the said Alexander Saxton and the defendant, but discloses a contract between the Port Burwell Harbour Company and the defendant. Secondly—that in the said declaration the plaintiff seeks to charge the defendant for a breach of the said agreement, on the ground that he did not commence or perform, the work therein mentioned during the spring of the year 1855 or during some time previous to the commencement of this suit, whereas it appears by the said article of agreement that the contract of the defendant was to commence the work so soon after the opening of the navigation of that spring as he could move a steam dredge and working apparatus to Port Burwell; and it is not alleged; or in any way shewn in the said declaration, that the defendant had had time, since the open ing of the navigation of that year, to remove a steam dredge and working apparatus to Port Burwell to commence the said work. Thirdly-that the said declaration is vague and uncertain, and in the alternative, and is insufficient, in this-to wit, that it is alleged therein that the defendant did not commence or perform the said work, &c.

Eccles and John Duggan, for the demurrer, as to the first ground, contended that the plaintiff could not sue upon the agreement, because the intention clearly was to make a contract with the company, and not with him individually: Johnson v. Hamilton, 13 U. C. R. 211, was referred to. They relied chiefly upon the second ground of demurrer, citing Ekins v. Evans, 2 U. C. R. 144; and a further objection was raised, not among those specially assigned—viz., that it should have been averred that the plaintiff did point out to the defendant where the work was to be done, or that defendant refused to go with him for that purpose when requested not merely that he was ready and willing to point out.

Leith, contra.—The effect of the agreement is, that the defendant was to commence the work this spring, so soon after the opening of the navigation as he could bring his dredge. The words "this spring" mean this spring at all events: that is to say, the defendant was to commence during the spring under any circumstances; but in order to fix more particularly some time in the spring, it is further provided that it must be so soon after the opening of the navigation as he can remove the dredge. [Robinson, C. J.—Then if the spring had elapsed, it would be no defence to say that he could not bring down the dredge.] No. The declaration avers that the spring has elapsed, and that is sufficient, according to the construction which the plaintiff contends for.

As to the other objection now raised, more is averred than mere readiness to point out. It amounts to this: the plaintiff goes to the defendant and says, "I am ready to point out, if you will go with me." It may have been impossible actually to point out the places, for defendant may not have been there. At all events, the allegation is sufficient on general demurrer—Kemble v. Mills, 1 M. & Gr. 757; Jackson v. Alloway, 6 M. & Gr. 942.

Robinson, C. J.—I think this declaration is plainly insufficient, in not shewing that the defendant had neglected to commence the work after the opening of navigation in the spring, and after he had had it in his power to remove the steam dredge and working apparatus to Port Burwell.

I do not find it stated, either in the contract or the record, where the steam dredge was at the time of the contract, or what impediment it may have been which retarded its being removed. We are asked to assume that it was frozen up in the ice in some harbour or river, and would be free as soon as the ice disappeared in the spring; but, whatever we may believe or surmise, we cannot judicially assume this.

If the fact were so, it was necessary to state it, because the declaration should shew, in all cases of conditional contracts, that the circumstances have occurred which are necessary to make the duty attach.

For all we can tell, the steam dredge may have been detained in some river or place which required to be deepened before she could get out of it, and may be yet not in that condition that it can be removed to Port Burwell, for all that is stated in this declaration.

I think there is nothing in the objection that the defendant's contract was not with this plaintiff, but with the company on whose behalf he made the contract.

The plaintiff has leave to amend his declaration on payment of costs, and I would recommend his attending to the exception that was taken on argument to the want of an averment that he had pointed out to the defendant where he wished him to excavate, or that he had requested the defendant to go with him in order that he might have the place pointed out to him, and the defendant had refused.

DRAPER, J.—The demurrer admits that the agreement declared on was sealed with the seal of the plaintiff, he therefore contracted with defendant and defendant with him. though for the president, directors, and company of the Port Burwell Harbour Company. This answers the first objection.

As to the second objection, the agreement was made on the 29th of March, 1855. Defendant agrees to commence the work so soon "after the opening of the navigation this spring" as he can remove a steam dredge or working apparatus to Port Burwell. I read the words "this spring', as solely connected with and referring to the opening of the navigation; as if it had been said, "so soon after the next opening

of the navigation," &c. But then the contract of defendant is not to commence during spring, but as soon after the opening of the spring navigation as he can remove the dredge; and I think it should have been averred that since the opening, &c., he might have removed the dredge, &c., and that he might have commenced the work; and then, upon averring everything done, or a readiness to do whatever lay upon the plaintiff, a proper breach might be assigned. As it it is, I think the declaration bad.

Burns, J., concurred.

Judgment for defendant on demurrer.

Doan v. Richardson.

Trespass qu. cl. fr.—Plea of former recovery—Repugnancy in description of premises—Demurrer.

Trespass qu. cl. fr. to the west-half of lot twenty-three, 3rd concession of East Gwillimbury. The defendant pleaded, by way of estoppel, a recovery in a former action of the same nature, brought by him against this plaintiff, setting out the pleadings there, from which it appeared that the declaration contained three counts, and that in the first the locus in quo, was described only by metes and bounds, and by reference to visible boundaries; in the second, as the west half of twenty-two; and in the third, as part of the west half of twenty-three, setting it out by metes and bounds. The plea averred the identity of the premises in that action with the close in this—

Held, on demurrer, that there was no real or apparent repugnancy in this assertion, and that the plea was good.

TRESPASS quare clausum fregit, describing the close as the west half of lot No. 23, in the 3rd concession of East Gwillimbury.

Plea—that the plaintiff ought not further to prosecute his said action, or to be admitted further to say that the said close at the said several times when, &c., was the close of the plaintiff, because heretofore, &c., the now defendant impleaded the now defendant in this court in an action of trespass, and such proceedings were thereupon had, &c., &c.—setting out the pleadings in that action, from which it appeared that the plaintiff there (the now defendant) complained of the defendant (the now plaintiff,) for breaking and entering his close; and that the declaration contained three counts, in the first of which the locus in quo was set out by metes and bounds, without any further description, as

follows:—"Situate in the township of East Gwillimbury, in the county of York aforesaid, and which may be known and described as follows, that is to say, commencing where a post has been planted at the easterly extremity of the fence which now divides the lands occupied by the plaintiff from those occupied by the defendant, thence north five degrees west seventy-nine links to a post, at which the fence which formerly divided the said lands of the plaintiff and defendant terminated; thence south seventy-five degrees west twenty-three chains; thence south five degrees east thirty-two links to where the said fence now stands; thence northerly seventy-six degrees east twenty-three chains, more or less, to the place of beginning."

In the second count it was described as "a certain other close of the plaintiff, situate in the township and county aforesaid, being the west half of lot No. 22 in the third concession of the said township."

In the third count, as "a certain other close of the plaintiff, situate in the township and county aforesaid, being a part of the west half of lot No. 23 in the third concession of the said township, and which may be known and described as follows: that is to say, commencing at the north-east angle of the west half of lot No. 22, in the said third concession; thence north five degrees west seventy-nine links; thence south seventy-five degrees west twenty-three chains; thence south five degrees east thirty-two links; thence north seventy-five degrees east to the place of beginning:"—

That the defendant pleaded—1. Not guilty. 2. That the said closes were not, nor were any or either of them, or any part thereof, the closes of the plaintiff, as in the declaration alleged. 3. That the plaintiff was not, at, &c., possessed of the said several closes, or of any or either of them, &c.; that issues were taken on these pleas, and the case having been duly carried down for trial, the plaintiff obtained a verdict, on which he entered judgment, which remains in full force. "And the now defendant further saith that the said parties in the said above mentioned action are the same parties in this action named, and not other or different parties, and that the said premises in the said above men-

tioned action mentioned and described, and the said close in which, &c., in this action mentioned, are the same and identical premises, and not other or different premises: verification.

Demurrer—That the said plea shews no defence in law, either in denial or in confession and avoidance of the cause of action alleged.

Dalton, for the demurrer, cited Wilkinson v. Kirby, 15 C. B. 430; Doe v. Wright, 10 A. & E. 763.

Eccles, contra.

Robinson, C. J., delivered the judgment of the court.

The declaration in the first action, as set out in the plea of estoppel, which is demurred to, contains three counts, in one of which the premises in question in that action are described in such a manner, without lots or concessions, but by reference to visible boundaries, that for all we can see on that record they may have formed part of any lot in the township.

In the second count the premises are described as the west half of lot No 22 in the 3rd concession of East Gwillimbury.

In the 3rd count they are described as being a part of the west half of 23, in the 3rd concession of East Gwillimbury, and the part that is intended is described by metes and bounds.

The declaration in the present action contains but one count, in which the close trespassed upon is described as the west half of lot No. 23, in the 3rd concession of West Gwillimbury.

Now the close described in the second count of the declaration in the first action can hardly be the same as that described in this action. They appear to be different closes, and it is a seeming repugnancy to call them the same.

The close in the third count of the declaration in the first action is apparently a part of the same close as is mentioned in this action, and may be that part of it on which the alleged trespass in this case was committed; and the close in

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the first count of the first declaration is so described that the defendant in this action is quite at liberty to aver that it is the same as the plaintiff refers to by the name that he has given to his close. There is no real or apparent repugnancy therefore in his assertion that they are the same; and as it does appear by the verdict and judgment in the first action that all the closes described in the first action were found and adjudged to be the closes of the plaintiff in that action who is defendant in this, and as the now defendant avers that they were in fact the same, and as the close spoken of in the present action is but one, if the defendants shews it to be identical with any one of the three closes which in the former action were adjudged to be the then plaintiff's closes, he lays the foundation for his estoppel. The plaintiff, by demurring to his plea, admits the identity, and we do not see on what ground it can be doubted that the judgment in the first action is a bar.

It is quite true that the close may have been the property of this defendant when the first trespass was commited, and yet may not be his property now. He may have had an interest in it which is now at end; but the principle acted upon in such cases is, that the state of things as they were found to exist upon the first trial is presumed to have continued to this time, unless it be shewn that a change has taken place; and indeed, without that, we do not see how a former recovery could be applied as an estoppel in cases of this description, and the same question as to the right might be litigated without end.

Judgment for defendant on demurrer.

The following gentlemen were called to the bar this term:
ROBERT ALEXANDER HARRISON, JOHN T. ANDERSON, FREDERICK KINGSTON, EDWARD MARTIN, CHARLES J. CARROLL.

HILARY TERM, 19 VICTORIA.

PRESENT:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J. THE HON. ARCHIBALD McLEAN, J. THE HON. ROBERT EASTON BURNS, J. (a)

BABY QUI TAM V. WATSON.

14 & 15 Vic. ch. 7, effect of—Sale of right of entry, and pretended rights— Registry laws.

A., the owner of certain lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds: the defendant, A's. son and heir at law, subsequently released to S., which was also recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff having sued the defendant for the penalty under 32 H. VIII. ch. 9, for selling a pretended right—

Held. that the 14 & 15 Vic. ch. 7, would not apply in defendant's favour, for that only allows the sale of a right of entry, and as his father's deed

was binding upon him, he had no such right; but

Held, also, that by the registry of the deed to S., the conveyance to the plaintiff became fraudulent in its intention, and therefore he could not recover. Semble, that the effect of the 14 & 15 Vic. ch. 7, is to repeal the 32 H. VIII. and not merely to permit the sale of a right of entry subject to the penalty,

Debt, on the statute 32 H. VIII. ch. 9. The declaration contained two counts. Plea—not guilty, by statute.

At the trial, before Burns, J., at the last assizes held at Sandwich, the plaintiff's counsel opened the following case to the jury:—John Gowrie Watson became the purchaser of lots 2 and 3 in the first concession, west side of the communication road in the township of Harwich, and parts of lots 2 and 3 in the first concession, east side of the communication road in the same township, in all 693 acres, at sheriff's sale for taxes, and on the 15th of October, 1842, obtained the sheriff's deed for the same, which was registered on the 26th of October, 1843. The title was previously a registered title. Watson, by deed of release, dated 22nd of May, 1843, conveyed the same lands to the plaintiff, but this conveyance had

⁽a) In the vacation preceding this term the Hon. James Buchanan Macauley resigned the office of Chief Justice of the Court of Common Pleas, and Mr. Justice Draper was appointed to succeed him. Mr. Justice McLean resigned his seat on the bench of the Court of Common Pleas, and was appointed to this court; and John Hawkins Hagarty, Esq., Queen's Counsel, was appointed one of the Judges of the Court of Common Pleas.

never been registered. The plaintiff subsequently conveyed the land to other persons, and it had passed through several handssince, and these subsequent conveyences were registered. After the death of John Gowrie Watson, the defendant, who was his heir at law, by deed of release, dated 31st of January, 1855, in consideration of 5s., conveyed the same lands to one William Sheldon. This conveyance was registered on the 10th of February, 1855. The defendant never had been in possession of any part of the lands, but the persons to whom the plaintiff had conveyed were in possession after the plaintiff conveyed. The plaintiff's counsel proposed to prove that the defendant, before he conveyed to Sheldon, was aware of his father's conveyance to the plaintiff, and was also acquainted with the fact that the plaintiff had transferred to other parties, who were in possession before he executed the deed to Sheldon.

The learned judge nonsuited the plaintiff on these facts, conceiving that the effect of the registry law was to give validity primâ facie to the subsequent conveyance, being registered, over the unregistered conveyance of the defendant's ancestor to the plaintiff; and that, although it might be urged that Sheldon was not a subsequent purchaser for valuable consideration, so as to enable him to take the benefit of the provision of the statute in favour of deeds made to subsequent purchasers for valuable consideration, yet that such a matter was not the subject of enquiry in an action of this description, for the penalty under the statute of Henry VIII.

The plaintiff accepted a nonsuit, with leave to move against it. During last term O'Connor obtained a rule nisi accordingly.

Prince shewed cause, and cited Doe dem. Williams v. Evans, 14 L. J. (C. P.) 237.

ROBINSON, C. J., delivered the judgment of the court.

This case brings up one or two rather curious questions. Our statute 14 & 15 Vic. ch. 7, allows a person now to sell a right of entry. Before that the owner of such a right, while dispossessed, could not dispose of it at common law, and was further precluded by 32 H. VIII. ch. 9, which forbids the sale of pretended rights, for in the construction of that statute it has always been holden that the being disseized

turned a good right of entry into a pretended right, the sale of which would bring a man under the penalty of the act.

But now we take it, that as a man may legally sell and convey "a right of entry," he is safe from the penalty in 32 H. VIII. ch. 9, in doing so, for he can no longer be looked upon as selling a pretended right, when the law allows such right to be the subject of a legal conveyance. It is contended that our statute 14 & 15 Vic. ch. 7 has not that effect, but that, though the right of entry may pass, the penalty may still be incurred. We do not at present think so; but it would have been well if our statute had taken notice of the 32 H. VIII. ch. 9, and had not left it doubtful how far its provisions were intended to be superseded.

However this may be, the law is only changed as to the case in which a party has conveyed "a right of entry," not when he professes to convey a right, when in fact he has none; and the case of a man who has no right taking upon himself to make a deed to another of land which a third party is in possession of, seems to us not to be affected by our statute 14 & 15 Vic. ch. 7, for it cannot be denied that that would be selling a pretended right.

Now, looking at the facts of the case before us, it is true that the defendant, when he made his deed to Sheldon, had no right of entry, for his father's deed to the plaintiff was binding upon himself and upon the defendant, who claimed under him; and though liable to be defeated by the prior registry of a subsequent conveyance, yet no right of entry or title of any kind remained in the defendant at the time he gave his deed to Sheldon, nor till the registration of the subsequent deed, and so far he came within the statute of Henry VIII. that he would have been liable, if any one now can be, to the penalty imposed by it: but when by the registry of the deed to Sheldon that deed had gained priority over the deed to the plaintiff, then, in order to carry out the Registry Act, we must hold that deed to have been in its inception fraudulent and void, in which case a right of entry was always continuing in the defendant the same as if that deed had never been made.

In the case of Major qui tam v. Reynolds, in this court,

Hilary Term, 6 Vic., the same view was taken of this point, and we adhere to that opinion.

The consequence is, that the deed to Sheldon must, so far as the Statute of Maintenance is concerned, be considered as lawful, and the plaintiff was therefore properly nonsuited.

Rule discharged.

McIntyre v. McBean and Twenty other Defendants.

Libel—Statement as to character of school-teacher—Privileged communication.

A representation by the assessed inhabitants of a school section as to the character of teacher made with a view of obtaining redress in a privileged communication, which it is of importance to the public to protect. and such a statement would not be the less privileged if made by mistake to the wrong quarter.

Quære—Whether a communication of this nature made by an inhabitant of any other part of the province, would not be privileged.

Where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but the plaintiff must give extrinsic evidence of actual express malice; he must also prove the statement to be false as well as malicious; and the defendant may still make out a good defence by shewing that he had good ground to believe the statement true, and acted honestly under that persuasion.

The plaintiff was a school teacher of an union school section, No. 3, in Lancaster, joined to a part of Charlottenburg, and was also a minister in holy orders. He took charge of the school in 1853, and at several visitations of the school which were afterwards made under the statute, his conduct as a teacher, and the progress of his pupils, were spoken of with approbation. Certificates of his character were produced down to the 30th of March, 1855.

On the 3rd of July, 1855, three of the defendants waited upon the local superintendent of schools for Lancaster, and presented to him a paper, addressed to himself, and purporting to be signed by all the defendants, in which it was stated that the undersigned, freeholders and householders of school section No. 3, of Lancaster, protested against the manner in which the school in that section was conducted under the plaintiff as teacher, under the superintendence of the local trustees.

It was specified in a formal manner what the complaints of the subscribers to the document were—namely: First, that

the trustees had not done their duty in not holding an arbitration on the school report for 1854, which report they stated had been rejected by a vote of the meeting held on the second Wednesday in January preceding. Secondly, that the school was conducted contrary to the School Act, as shewn by the Chief Superintendent's letter, which states it to be contrary to law to teach the classics in a common school during school hours. Thirdly, that the school was irregularly conducted, being opened and shut at the option of the teacher. Fourthly, that the teacher is not a man of strictly temperate habits and good moral character, such as the law demands. And the paper concluded thus: "Owing to these circumstances, we the undersigned protest against the payment of any school rates whatever, and notify you to withhold your order for the government grant to this section, until these matters shall have been satisfactorily adjusted."

The plaintiff brought an action against the defendants as signers of this paper, complaining of that passage in which it charged him with not being "a man of strictly temperate habits and good moral character, such as the law demands," as being a false and malicious libel upon him.

The declaration contained two counts. In the first the plaintiff averred that he never had been, and was never supposed or suspected to be, a person of intemperate habits, or bad moral character; yet that the defendants, well knowing this, but maliciously contriving and intending to injure the plaintiff, and to cause it to be believed that he was a person of intemperate habits and of bad moral character, and had been guilty of immoralities, crimes, misconducts, and offences, andto deprive him of his situation as teacher, falsely and mali ciously composed and published concerning him, in the form of a letter to the local superintendent of common schools, &c., a certain false and defamatory libel, containing among other things the words following, viz., "that the teacher (meaning the plaintiff) is not a man of strictly temperate habits and good moral character, such as the law demands," meaning thereby that the plaintiff was a man of intemperate habits, and a person in other respects of bad moral character, and one who had been guilty of other immoralities, lewdness, dishonesty, and misconduct.

In the second count the plaintiff alleged that the defendants, intending to injure the plaintiff, and to cause it to be suspected and believed that he was a person of immoral character, and had been guilty of immoralities, indecencies, lewdness, dishonesty, and general misconduct, and to deprive him of his situation as teacher, &c., falsely and maliciously composed and published concerning him, in a letter to the local superintendent, a false and malicious libel; setting out the same words as in the first count, and adding, "meaning thereby that the plaintiff was not only a person of intemperate habits, but was also in other respects of bad moral character and depraved habits, and one who had been guilty of other immoralities, and of indecencies, lewdness, dishonesty, and general misconduct.

The defendants all pleaded "Not guilty;" and one of the defendants, William Gillespie, pleaded also four special pleas to the whole declaration, in the first of which he averred that the plaintiff, so being a teacher, at the several times when, &c., was not a man of strictly temperate habits and good moral character, such as the law demands, but, on the contrary thereof was intemperate, and was, to wit, on, &c., (specifying several days,) in a state of intoxication; wherefore the defendant composed and published concerning him the words in the declaration mentioned, as it was lawful for him to do, &c.

In the second of these pleas the defendant Gillespie averred, as before, that the plaintiff was not a man of strictly temperate habits and good moral character, such as the law demands, but on the contrary was intemperate, and was for a long space of time, tow it, four weeks, in August and September, 1854, incapable of discharging his duties as such teacher, in consequence of his being intemperate and intoxicated; wherefore the defendant published the words complained of, &c.

In his third special plea the defendant Gillespie pleaded that the plaintiff so being a teacher, was not a man of strictly temperate habits and good moral character, &c., (as before) but on the contrary was intemperate, and was, to wit, in the month of June in the year 1854, in a state of drunkenness; wherefore the defendant published the words, &c.

In the last of his special pleas the defendant Gillespie

pleaded that the plaintiff, so being a teacher, was not a man of strictly temperate habits, &c., (as before,) but on the contrary thereof was intemperate, and was on divers days and times, during the time he had been such teacher, in a state of intoxication; wherefore the defendants published the words, &c.

The plaintiff replied to these special pleas, de injuria, &c.

At the trial, at Cornwall, before Macaulay, C.J., the local superintendent stated, that as the paper did not come to him through the trustees, he did not act upon it, but gave it to the trustees, who have power by law to remove teachers. He proved that among those whose names were subscribed, and who were made defendants in the action, many had no children, and that others of them who had children did not send them; that one of them lived out of the section, and another was only temporarily resident within it; but it was not shewn that any of the defendants were not assessed for school rates in section No. 3; and it was sworn that most, if not all of them, might have voted at the election of school trustees.

It was proved that among the defendants two (Alexander McBean and William McBean), had in December, 1854, signed a certificate, given on an occasion of visiting the school, in which it was stated that the progress of the scholars, and the method of teaching, and the state of discipline in the school, reflected great credit on the Rev. Mr. McIntyre, the present plaintiff.

One of the witnesses swore that he thought the words in the libel about the plaintiff not being a man of good moral character meant something more than intemperance; for that after the paper had been delivered to the superintendent, William McBean, one of the defendants, spoke to him of some indecent or improper conduct of the plaintiff, in regard to a young woman, whom he named.

This defendant, William McBean, was at the time a trustee of the school. Alexander McBean, another of the defendants, had been teacher of the same school before the plaintiff was appointed, and had resigned it voluntarily.

Both the McBeans had taken rather an active part in getting signatures to the paper; and one of the witnesses for the plaintiff stated that there was a good deal of party feeling

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among the people in regard to this school, and that he thought the object of some of those who signed the paper was to get rid of the plaintiff as a teacher.

The plaintiff's witnesses, however, admitted that reports were very general that the plaintiff was a man of intemperate habits, and on their cross-examination such facts were elicited as went very far to account for these reports.

At the conclusion of the plaintiff's case, the defendants' counsel objected, that no action could be sustained, treating the representation to the school superintendent as a libel, for that it was clearly a privileged communication. For the plaintiff, on the other hand, it was contended, that whether the complaint was made bond fide, with a view to redress for a supposed public evil, or maliciously and in order to injure the plaintiff, was a question for the consideration of the jury; and concurring in that view, the learned Chief Justice allowed the case to proceed.

The defendants then called a number of witnesses, who gave strong and circumstantial evidence to prove that the plaintiff had been and was then a man of very intemperate habits.

The learned Chief Justice explained to the jury that what was complained of as a libel was prima facie a privileged communication, which the defendants were at liberty to make to the superintendent of schools, provided they acted bona fide, and not maliciously; that the question for them was, whether they made the statement maliciously, or whether they acted on reasonable grounds. He remarked that he thought the evidence was sufficient to shew good ground for complaining, and to repel malice, but that it depended upon what the jury believed to be the truth. He told them that intemperance was immorality, especially in a school teacher, with regard to whom the words "good moral character," as used in the School Act, must be taken to include sobriety; and he remarked upon the circumstance of the paper not being a complaint invoking inquiry, but rather a mere protest.

They were told to find in favour of the defendant Gillespie on the special pleas, if they found the facts stated in them to be true.

The jury found in favour of four of the defendants, there

being no evidence to connect them with the publication; and against the other defendants, including Gillespie, with £100 damages.

Christopher Robinson obtained a rule nisi for a new trial, on the grounds that the verdict against the defendants convicted was against law and evidence, and the judge's charge, and for excessive damages. A. McLean shewed cause.

The following authorities were cited on the argument:

Cook v. Wildes, 30 Eng. Rep. 284; Taylor v. Hawkins, 16 Q. B. 308; Somerville v. Hawkins, 10 C. B. 583; Padmore v. Lawrence, 11 A. & D. 380; Wright v. Woodgate, 2 Cr. M. & R. 573; Gilpin v. Fowler, 9 Ex. 615, 18 Jur. 292, S. C.; Harrison v. Bush, 1 Jur. N. S. 846; 13 & 14 Vic. ch. 48, sec. 27, subsec. 3; sec. 29; sec. 31, subsecs. 2, 3, 5, 8.

Robinson, C. J., delivered the judgment of the court.

We look upon this case as one of very great importance in a public point of view. Nothing can be of more consequence to the community than that the teachers of youth should be men of temperate habits, and in other respects of good moral character. We know that there is a disposition in many people to be indulgent in the notice they choose to take of the vice of intemperance, so long as the person subject to the habit keeps within any tolerable bounds. Men are seen to be employed and trusted in almost every description of business who are notoriously intemperate, provided they have so much control over themselves as to be sober at times. Whether this disposition to overlook what is something worse than mere infirmity be fortunate or unfortunate, there is one thing very clear, that the instructors of youth in our public schools are required by positive law to be men of strictly temperate habits and good moral character; and no one who thinks at all upon the subject, can doubt that it may have a most pernicious effect upon the character of young persons, if they see a person who is in authority over them, and to whom they look up for instruction and example, intoxicated in school while he is in discharge of his duty, and scarcely less pernicious as an example if they should see him habitually intoxicated while he is out of school, for in either case it must be destructive of discipline by diminishing their respect for their master.

One cannot but admit most readily, that the parents of any children who have the misfortune to be placed under such a teacher, or any other of the inhabitants of the school division who are rated to the support of the school, are doing a commendable thing when without loss of time they bring any such case under the notice of the proper authority, in order that the public evil may be redressed; and if, under an erroneous impression, they should happen to address their complaint to the wrong quarter, they are safe from any prosecution at the instance of the party of whom they are complaining, so long as it appears that the representation was well founded, or that they had good reason to believe it was, and that they acted in sincerity and good faith, not maliciously and without just cause or excuse. We do not wish it indeed to be understood, that any inhabitant of the province, even though he should have no interest in that particular school district, would not be regarded as privileged in making a communication of this nature to the proper quarter, if done in a proper spirit, and for the purpose of preventing a public evil. not necessary, however, to go into that question.

When we look at the evidence which was before the jury, even at that which was given by the plaintiff's witnesses we must say that we think there is great reason to apprehend that the jury have not dealt discreetly and justly, though no doubt it was their intention to do so; and we are not without apprehension that they may have misunderstood the charge which they received from the learned Chief Justice. They were told that in its nature the paper that was complained of as a libel was prima facie a privileged communication, but that it was for them to determine whether the defendants had acted maliciously in making that communication: that as the complaint was one which the defendants had a right to make if it were well founded, that circumstance operated so far in their favour that the jury should look upon it as repelling the inference of malice, which might under other circumstances be drawn from the mere language of the paper; and that it was

necessary for the plaintiff, before he could be allowed to recover, to shew to them by evidence that the defendants in making the communication did act maliciously. We fear it may not have occurred to the learned Chief Justice to qualify this remark by adding (what we conceive to be the true principle), that before it could become material for the jury to inquire whether the defendants acted maliciously or not, the plaintiff must satisfy them that what the defendants had stated of him was not true in itself, and that they had no reasonable ground for believing it to be true. If it were true in fact, or if the defendants acted upon reasonable grounds for believing it to be true, then, as they addressed their complaint to that quarter to which they might properly look for redress, they could not be found guilty merely on the ground that they had an unfriendly feeling towards the plaintiff, or had spoken of him in harsh terms, and had expressed or shewn a strong determination to have him removed if possible. Feelings of that kind might naturally spring up in consequence of the measures which the defendants might be justly and conscientiously taking, and of the resentment which such measures might excite in the mind of the plaintiff and his friends; but it surely is of no consequence how ill natured a pleasure even a party may take in doing that which he has a right to do. the facts were such as to warrant him in taking the steps which he had taken, he is not the less privileged because he may have shewn an unamiable temper, and may have evinced a strong determination to push a rightful proceeding to the utmost.

In the infinite number of cases in which the question of privileged communication has been discussed, we do find the law again and again laid down in such a manner, that we might well understand the learned judges to mean, that however clear might be the fact that the alleged libel was, under the circumstances, a privileged communication, yet if the defendant acted maliciously in making it, he should be convicted of libel. Now the evidence might shew in any such case a strong feeling of ill will against the plaintiff, such as the jury might well call a malicious feeling, if they were considering it apart from the cause which produced it, and not a

little malicious even when considered in connection with the cause which did produce it; but yet we conceive that would not signify, so long as the jury were convinced from the evidence that there was really good ground for making the complaint; and this good ground, we must always bear in mind, consists not exclusively in the complaint being literally or substantially true, but may consist also in the fact that the defendant was warranted in believing it to be true.

For instance, if in the present case it were admitted to be true that the plaintiff was a man of intemperate habits when these defendants united in making the statements complained of, or that there was strong reason to believe that he was, some one or more of them might have signed the petition against the plaintiff with regret, and if left to themselves might, for the mere sake of a quiet life, have preferred overlooking the misconduct, and allowing the evil to continue; while others of them might have been earnest and indignant, loud in their denunciations of the plaintiff's misconduct, and free in expressing their determination to insist upon his dismissal. A jury, if instructed to find whether any of the defendants acted maliciously or not, might act on the common acceptation of the word, and find some of the defendants guilty and acquit the others; but we take it to be clear that in the case we have supposed, all the defendants would be equally privileged in the eye of the law, and therefore equally safe in applying for redress.

We might suppose many cases which would in our opinion illustrate the principle, as we understand it, too clearly to leave it doubtful. We refer to the cases of Weatherston v. Hawkins (1 T. R. 110), and to what was said by Lord Ellenborough in the case of Dunman v. Bigg, reported in a note to 1 Camp. 269. In Bromage v. Prosser (4 B. & C. 255), Mr. Justice Bayley observes, that malice, in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.

Now, according to this definition of malice in its legal sense, the defendants could not be properly found to have acted maliciously if they made their statement with just cause and excuse; and yet I confess that even in the same case in which Mr. Justice Bayley gives this definition of malice, he seems in the course of his judgment (page 257) to admit malice to be a material subject for inquiry, even where the defendant was asked a question respecting the plaintiff's circumstances, and where the jury were of opinion that he had said what he did say merely by way of honest advice, and to regulate the conduct of the person who made the inquiry.

. The cases of Shipley v. Todhunter (5 C. & P. 690), Wright v. Woodgate (2 Cr. M. & R. 573), Somerville v. Hawkins (10 C. B. 583), and Gilpin v. Fowler (9 Ex. 615), are among those in which the principles on which these cases turn have been most discussed; and though we may be wrong in our interpretation of them-and we acknowledge that if our idea of the principle be correct, it is not very distinctly brought out in those cases, or in others that might be referred to-yet, having considered them, we take the true principle intended to be stated to be this, that where there is a fair occasion for making the statement complained of, it is not to to taken to be malicious, though it may turn out to have been unfounded; in other words, that the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but that there must be proof given by the plaintiff of actual express malice, independently of the evidence of such a feeling which the paper itself would seem to supply. And we conceive that the plaintiff, even in such a case, cannot sustain his action upon this proof of malice alone, but that he must also shew the statement to be false as well as malicious; and when he has done this, the defendant may vet make out a good defence, if he can prove that he had good ground for believing the statement to be true, and acted honestly under that persuasion.

Now in the present case, we lament to say that the evidence even from the plaintiff's own witnesses, proved a very strong case against him; and after the whole case had been gone through, we cannot understand how a doubt could remain that the plaintiff was a man of very intemperate habits, and disqualified on that account from being master of a public school, though he may have been in other respects a very competent teacher, as he seems to have been.

The jury seem to have considered that his ability as a teacher compensated for his irregularities, but the inhabitants who had an interest in the school had a right to take a sounder view of the qualities required, and we feel compelled to say, that if upon such evidence as was given in this case the defendants could not safely make the statement which they did to the local superintendent of schools, or any one who they supposed could properly exercise a control in such matters, without being exposed to a verdict for heavy damages, the public will have no reasonable security against evils of the most ruinous tendency. The amount of the verdict, though rather high, is not objectionable as excessive, if there was a good ground for action; but for the reasons we have stated, the plaintiff was not, we think, entitled to recover, and we do not understand that the learned Chief Justice thought differently of the merits of the case, though he thought it proper to submit the different points to the jury in the terms in which they were submitted. We grant a new trial on payment of costs.

DRAPER, J.—I agree in all respects with the judgment just delivered. The principle laid down in it may be tested by special pleading: suppose the defendant pleads that the statements complained of are true, and the plaintiff replies, that although true, yet the defendant made them maliciously, that could hardly be a good replication, and if not, then clearly malice in stating the truth is no ground of action.

Burns, J., concurred.

Rule absolute.

SILLIMAN V. McLEAN.

Sale on credit not expired—Action brought on common counts.

Defendant purchased goods at auction, on the following terms:—"Under £2 10s., cash down; over that amount, but under £125, eleven months credit on approved indorsed notes with interest." Held, (confirming Wakefield v. Gorrie, 5 U. C. R. 159,) that an action would not lie upon the common counts until the time of credit had expired.

Assumpsit on the common counts, for goods sold and delivered. *Plea*—Non assumpsit.

At the trial, before Burns, J., at the last assizes held at Chatham, it appeared that the defendant purchased a quantity

of goods and chattels of the plaintiff at a public auction on the 1st of November, 1854, amounting to the sum of £59 16s. 1d. The terms made known at the auction, and upon which the goods were sold, were as follows: "Personal property under £2 10s. cash down; over that amount, but under £125, eleven months' credit on approved indorsed notes with interest." The goods and chattels purchased were delivered to the defendant, but he never furnished the notes or tendered them to the plaintiff. The action was commenced on the 1st of March, 1855.

It was objected that the plaintiff could not recover upon the common count, but should have declared specially for not giving or tendering a note, and leave was reserved to the defendant to move for a nonsuit upon this ground.

Becher obtained a rule nisi accordingly, citing Wakefield v. Gorrie, 5 U. C. R. 159; Strutt v. Smith, 1 Cr. M. & R. 312; Simon v. Lloyd, 2 Cr. M. & R. 187.

C. Robinson shewed cause, and cited Sm. Merc. Law, 5th Ed. 516; Chy. Con. 389; Sedg. on Damages, 285.

Robinson, C. J.—This case closely resembles that cited of Wakefield v. Gorrie (5 U. C. R. 159), in which Idid not concur in the judgment of the court. It remains for my brothers to say whether they consider that judgment applicable to the present case, and binding upon us, though the court were not unanimous. I retain the opinion I expressed. It does not seem to me that any action would lie against the defendant as upon an express contract to give a note; but that the agreement was only that the goods were to be paid for on delivery, unless he gave an endorsed note.

In my judgment, such cases are clearly distinguishable from Musson v. Price (4 East 147), Dutton v. Solomonson (3 B. & P. 582), and that class of cases.

DRAPER, J.—I should feel bound by the judgment in this court unless it appeared to me to be clearly erroneous; and not feeling clear that it is so, I am disposed to adhere to it, though I am not perfectly satisfied with the decision.

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Burns, J.—I think we are bound by the decision given in this court in Wakefield v. Gorrie, until that case be overurled. I am not prepared to say I think that case wrongly decided, for it may be argued, as applied to this case, that in the one now before us the time of credit is part of the contract, and if so, then that the plaintiff by delivery of the goods did not alter the contract, nor did the defendant do so by not giving the promissory note; consequently the action should be for not giving the note.

Rule discharged.

CHARLES PULKER AND HARRIET HOLMES PULKER, HIS WIFE, FORMERLY THE WIFE OF JOHN ELLIS, v. EVANS.

Dower-Plea of non-tenure-Mortgage by husband-Election.

Dower-Plea, non tenure. It appeared that the husband before his death had executed a mortgage in fee of the premises, which was still unpaid: the tenant, who was not shewn to be in possession, claimed under a purchase at sheriff's sale, upon execution against the husband's land.

Held (affirming Cumming v. Alguire, 12 U. C. R. 330), that demandant could not recover against him.

Held, also, that a plea of election by the demandant to take under her husband's will was not sustained upon the evidence set out below.

The plaintiffs claimed dower in five messuages, barns, &c., and one acre of land, being lot number 3, on the north side of Harriet-street, in the town of Perth, as the reasonable dower of Harriet Holmes Pulker, by the endowment of her husband, the said John Ellis, deceased.

Pleas-1. That Samuel Reddy Evans was not at the time of the commencement of this suit, or at any time thereafter, and that he is not the tenant of the premises, or any part thereof, as of freehold, and concluding to the country.

2. As to a part of the premises, particularly described, that the said plaintiffs ought not to maintain their action, because he the said Samuel Reddy Evans was not at the time of the commencement of this suit, or at any time thereafter, and is not the tenant thereof, or any part thereof, as of freehold, and this he is ready to verify.

3. That as to all the said premises, except the part described in the second plea, the plaintiffs ought not to maintain their action, because the said Samuel Reddy Evans says, that during

the coverture of the said Harriet Holmes Pulker, and while she was married to the said John Ellis, to wit, on the 28th day of January, 1849, the said John Ellis was seized in fee of the said land and premises in the introductory part of the plea mentioned, and that while he was so seized in fee, to wit, on the 28th day of January, 1849, he duly made and published his last will and testament in writing, as by law required for passing real estate, and thereby, amongst other things, did give and bequeath the same unto his wife, the said Harriet Holmes Pulker, then Harriet Holmes Ellis, to have and to hold the same to her, and to her heirs and assigns for ever; and that the said John Ellis afterwards departed this life, seised in fee of the said premises in the introductory part of this plea mentioned, without having revoked his said will: and that afterwards, to wit, on the 30th of January, in the year last aforesaid, the said Harriet Holmes Pulker, then Harriet Holmes Ellis, entered into possession of the same, and elected to accept, take and receive, and did accept, take and receive the same, under the devise so made to her, and became and was thereof seized in fee-concluding with a verification.

Replication—To first plea, taking issue.

As to the cause of action in the second plea, the demandants will not further prosecute their suit.

As to the third plea, that Harriet Holmes Pulker, one of the demandants, did not elect to accept, take or receive, nor did she accept, take or receive the said premises in the plea mentioned, or any part thereof, under the devise to her therein mentioned—concluding to the country.

At the trial at Perth, before Macaulay, C.J., it was proved on the part of the demandants that the premises had been conveyed to John Ellis by deed of bargain and sale, bearing date the 8th day of June, 1847, from Maria Graham and others; that Ellis entered into possession and occupied till the time of his death; that he left a will devising the premises to his wife; that he died in February, 1849, leaving his wife in possession; that she had the sole possession and control of one house on the premises, and let some of the rooms, and received the rent; that there were three houses on the premises, one of which was let by Ellis before his death, and that the executor of Ellis, Daniel Cowley, received the rent of that house; that

she left in the fall of 1852, sometime after her marriage to her present husband, and possession was then taken by Mr. Buell.

A deed was produced by Mrs. Graham from Andrew Dickson, late sheriff af the united counties of Lanark & Renfrew, bearing date the 22nd of February, 1853, to the defendant, reciting the issue of a writ of execution out of the Court of Queen's Bench, at the suit of Maria Graham, against the lands and tenements which were of John Ellis deceased at the time of his death in the hands of Daniel Kay Cowley, executor of the said John Ellis, to be administered—the seizure of the premises under the said execution—the issuing of a writ of Ven. Ex., and the sale under it to the defendant for the consideration of £500. The deed conveyed to the defendant, and his heirs and assigns for ever, all the legal and equitable estate, right, title, interest, and property, and the equity of redemption of John Ellis, at the time of his death of, in, or to the premises and the appurtenances.

The defendant was called as a witness on the part of the demandant, and proved his purchase at the sheriff's sale through Mr. Buell as his agent; that he and Mrs. Graham had not a joint interest in the premises; that she held a mortgage from John Ellis, under which she had still an interest remaining, and that the leases of the premises were made out by Mr. Buell, and sent to Montreal to be executed by Mrs. Graham.

For the defendant, a mortgage was put in from John Ellis to Maria Graham, dated 27th of August, 1847, for the payment of a debt of £300 on the 27th day of August, 1850, registered on the 23rd of October, 1847. An inlenture was also put in dated 1st June, 1848, from John Ellis to Maria Graham, in fee; proviso to pay £632 and interest in twelve months; registered 17th of August, 1848.

The learned Chief Justice directed the jury that the mortgage in fee shewed the freehold to be in Mrs. Graham, and the evidence of the defendant that she was in possession also. As to the third issue—election to take the premises under the will—it was left to the jury with observations, not leading to a conclusion in favour of the tenant, that it was not an advised election in lieu of dower. It was agreed between the parties that if the jury should find for the defendant the demandants should be at liberty to move to enter a verdict for them, if in the opinion of the court they were entitled in law to recover on the evidence. A verdict was found for the tenant.

Phillpotts obtained a rule nisi, pursuant to the leavereserved to which Richards shewed cause, citing Cumming v. Alguire, 12 U. C. R. 330. Phillpotts supported the rule, and cited, Breakenbridge v. King, 4 O. S. 330; Chisholm v. Tiffany, 11 U. C. R. 338.

McLean, J., delivered the judgment of the court

The case cited, of Cumming v. Alguire, is conclusive against the right of the demandants to recover. The fee of the premises in which dower was sought to be recovered was clearly shewn to be in Mrs. Graham under her mortgage, and no possession was shewn in the defendant; on the contrary, it was shewn that Mrs. Graham executed leases of the premises, and that the defendant, under his deed from the sheriff, could claim nothing but the equity of redemption, and was not in a position to assign dower to the demandants. It is not necessary to decide the question whether there was any acceptance of the devise from John Ellis to his wife. Is is quite clear that he could not devise the fee which at the time of his death was in Mrs. Graham, and the continuance of the wife for a time in possession of part of the premises, and the enjoyment of a portion of the rent, can scarcely under the circumstances be taken as an election on her part to take such interest as she could acquire under the will in liew of dower.

The verdict appears to be quite correct, and the rule must therefore be discharged.

Rule discharged.

McGill v. Squire.

Dower-Release by demandant without second husband.

Dower.—Pleas: 1, Never seized; 2, Never married; 3, Non-tenure; 4, Payment in satisfaction of dower; 5, A release by demandant to one W., through whom the tenant claims. At the trial it appeared that demandant's first husband conveyed the land in question, with other land, to W. as trustee, to transfer it to M., the husband's brother. After the husband's death the brother allotted this land to demandant, and she, being married a second time to one McGill, sold it to the defendant, who paid her the purchase money, and received a conveyance from W., executed at demandant's request. A release was produced, executed by demandant, describing herself as Bridget McGill, late widow of M., her first husband, to W. of all her dower "to the within mentioned land," dated the same day as the first husband's deed to him, but it was not shewn that this release had been annexed to or endorsed on any other deed.

Held—affirming Howard v. Wilson, 10 U. C. R. 186—that on these pleadings demandant must suggest the proposed in the proposed in the second of the

Held—affirming Howard v. Wilson, 10 U. C. R. 186—that on these pleadings demandant must succeed, notwithstanding the apparent injustice of the case, for the release was void, because the second husband did not

join in it.

The demandant, Bridget McGill, sued for dower as the wife of Patrick McGowan, deceased, her first husband, in lands in the town of Guelph, not specified, alleging service of written demand of dower before action brought.

Pleas—1. Traversing her husband's seizin. 2. Traversing her marriage. 3. Non-tenure of tenant. 4. Payment by tenant of £100 in satisfaction of dower, and acceptance thereof. 5. That demandant, after the death of McGowan, her husband, and before this suit—viz., on the 23rd of May, 1843—released to James Walsh, then tenant of the fee, all her dower and right of dower in the premises in question, and to his heirs and assigns, from which James Walsh, the tenant, derives his title.

Replication.—Issue joined on the first three pleas; to the fourth, denying payment of money in satisfaction of dower; and to the fifth, non est factum to the alleged deed-poll of demandant, releasing her dower to Walsh.

At the trial at Guelph, before McLean, J., it appeared that in April, 1833, the Canada Company conveyed to Patrick McGowan in fee lot No. 264 in the town of Guelph. He had been married before that to the demandant, and about 1836 he died, and the demandant married one McGill, who was also since dead. It appeared that in 1835 McGowan conveyed this lot (No. 264), with another lot in Guelph, to one James Walsh; and Walsh, who was examined as a wit-

ness on the trial, swore that this deed was not made to him for his own benefit, but for the purpose of its being transferred by the witness to Owen McGowan, the brother of Patrick McGowan; and that subsequently to the death of the latter, which occurred not long afterwards, he (Walsh) came to an understanding with Owen McGowan and the demandant as to the disposition of Patrick McGowan's property; that on that occasion Owen McGowan determined that, of three town lots which his brother had owned, one should be given to a Mrs. McTeague for her kindness to him in his illness; that another should be given to the demandant; and that he (Owen) would retain the third himself. The one given to the demandant he swore was the best of the three. demandant was soon afterwards married to McGill, and removed to another part of the country; and being in want of money she sold the lot to one Edgar, who was unable to make his payment, and she afterwards sold it to the defendant in this action (Squire), who paid her the purchase money, £25, in presence of Walsh, and received a conveyance from Walsh made at the demandant's request, on the 14th of January, 1845.

The tenant, Squire, had been ten years in possession of the lot, and had built upon it. He was called by the demandant as a witness on the trial, and admitted that in the transaction nothing was said about dower; that is, that there was no stipulation or understanding that the widow was to accept the lot assigned to her as a satisfaction of all claim for dower.

Walsh, it appeared, was merely a trustee, having no beneficial interest in the land conveyed to Squire.

There was produced and proved on the trial a writing under seal, executed by the demandant in presence of two witnesses, one of whom was dead and the other absent from the province. This was dated the 24th of May, 1843, and appeared to be in the handwriting of one of the witnesses, who was at the time deputy-registrar of the county. It ran thus: "Know all men by these presents, that I, Bridget McGill, late widow of the within named Patrick McGowan, deceased, for the sum of five shillings to me paid by the within named James Walsh, have remised, released, and forever relinquished and quitted

claim unto the said James Walsh, his heirs, executors, administrators, and assigns, all and all manner of dower to the within mentioned land and premises, which I now have, or hereafter might have."

It was not proved that this writing was ever attached to any deed, or formed part of a paper on which any other deed was written, nor was there any appearance of its having been so attached; so that there was nothing to connect it with any particular land or estate, and no explanation was given to account for this: it was dated on the same day as Patrick McGowan's deed to Walsh, and might have formed part of the same paper on which that was written.

Walsh swore that the demandant relinquished in his favour all her right to dower in all the land of her husband (McGowan), and got the £25 in satisfaction of all her claim on his estate.

No objection was taken at the trial to the vague nature of the instrument put in as a release of dower, but it was objected to it that it could not operate, because it was not executed jointly with demandant's then husband, McGill. who was living at the time, and until after Walsh conveyed to Squire.

The jury found for the tenant.

M. C. Cameron obtained a rule Nisi for a new trial on the law and evidence, and for misdirection.

Wilson, Q.C., shewed cause, and cited Martin v. Mitchell, 2 Jac. & W. 425; Sug. on Powers, 206; Helps v. Hereford, 2 B. & Al. 242; Wood v. Lambirth, 1 Phillips 8; Moreau's Case, 2 W. Bl. 1205; Ex parte St. George, 8 Taunt. 590; Slee v. Graham, 2 U. C. R. 389; Brown v. Daubeny, 4 Dowl. 588; Cruise Dig. V. 115, 177; 37 Geo. III. ch. 7; 48 Geo. III. ch. 7; 50 Geo. III. ch. 10; 3 Wm. IV. ch. 9; 2 Vic ch. 6.

M. C. Cameron, contra, cited Park on Dower, 213; Howard v. Wilson, 10 U. C. R. 186.

ROBINSON, C. J., delivered the judgment of the court.

We see no ground on which this case can be distinguished from Howard v. Wilson (10 U. C. R. 186). We cannot con sider any apparent hardship in the case. There may be,

perhaps, a remedy for that, if the facts be really such as to shew that the demandant received her lot of land in consideration of giving up her claim to dower on all her husband's estate, or that she is debarred from claiming this land by reason of anything which would not avail the tenant in a court of law. We have only to deal with the case upon the issues presented on the pleadings, and no question has been raised except upon the issue on the fifth plea, in which the tenant pleads that the demandant, on the 23rd of May, 1843, released her dower in this land to James Walsh. To that plea the plaintiff replies non est factum, which throws upon the demandant the burthen of proving a valid release, or, as expressed in Slee v. Graham (2 U. G. R. 387), a deed executed by a person capable of contracting. Before the new rules of pleading, upon non est factum pleaded in a plea, coverture being shewn entitled the defendant to succeed, because it shewed the deed to be not merely voidable but void; and this being so, although the law has been so far changed by the new rules of pleading that in such a case coverture must be specially pleaded, and cannot be given in evidence by the defendant on a plea of non est factum, yet, as the new rules do not apply to replications, we must treat coverture as good evidence on non est factum when the plaintiff replies in that form to a deed set up by the defendant.

Now, whether the deed executed by the demandant alone, during her coverture by her second husband, can be otherwise than void, is the question—the same, in truth, that this court has decided in the case referred to, which decision is binding upon us—and I do not see on what ground there could be any hope of sustaining the release. The deed of a married woman can have no operation unless it can be shewn to have been made for the purpose of barring her dower, and made in such a manner as the acts allow; but—besides that those acts, when read in connection, shew clearly that they are meant to extend only to such deeds as a married woman desires to make in order to facilitate a conveyance of the estate by her husband, which is not the purpose for which this deed was made—it would, at any rate, be inoperative under the statute

⁴ a-vol. XIII. Q. B.

of 1797, or any of the subsequent acts, for want of any certificate of examination; and it cannot be treated as a deed conveying any estate of hers which had become vested, because in that case it would have been indispensable, under the statute, that her husband should have been a party to the deed.

The case has been argued only on this point; and indeed it is evident that upon the other plea, of payment by the tenant to demandant of money in satisfaction of her dower, the tenant could not be entitled to succeed upon the evidence; since it was proved by the tenant himself that he paid nothing on that account, so far as he knew; and any evidence relating to her (demandant) having been satisfied, for her dower was given by Walsh, and it had no reference to any payment made by the tenant, but amounted to this: that when Walsh took his deed from Patrick McGowan, which was nearly three years before the tenant purchased, it was agreed that she should give up her dower in all the lots, and that she received the £25 which the tenant paid in satisfaction of her dower in all the land.

The justice of the case seems most decidedly against the demandant's claim; for, according to the evidence, she seems to have received the proceeds of the fee simple of the very lot in which she is now suing for dower, and suing the very person who paid the purchase money which went into her hands. Still the fee simple of the land was never in fact in her, and her husband was seized of the fee during coverture, and her claim for dower is met only by pleas which have not been proved.

It is not for us to advise what remedy in such a case the tenant might have or may have had; we have only to give judgment on the single point raised at the trial, and to determine whether upon that objection taken the tenant ought or ought not to have prevailed.

Rule absolute.

GORE DISTRICT MUTUAL INSURANCE COMPANY V. SIMONS.

Mutual insurance company—Premium notes not negotiable—Indorsements by secretary—Waiver of notice of non-payment—6 Wm. IV. ch. 18—4 § 5 Vic. ch. 64—16 Vic. ch. 192.

A mutual insurance company sued upon a note, alleging it to have been made by C., payable to the company or order, endorsed by them to defendant, and by defendant to them again. It was one of their ordinary premium notes, given to obtain a policy of insurance for C., endorsed by the secretary of the company, without recourse, and specially by defendant as follows: "I hereby make myself responsible for the within.—T. M. S." It was proved that defendant, when spoken to by the secretary, had said that C. ought to pay the note, but that if he did not he supposed he must.

Held, that the plaintiffs could not recover upon the declaration, for such notes are not negotiable, and the company cannot transfer them by en-

dorsement.

If this were otherwise—Semble, that the secretary might have endorsed the note for the company; but that the declaration of defendant could not be

treated as dispensing with notice of nonpayment to him.

The plaintiffs declared that Donald F. Campbell, on the 6th of September, 1853, made his promissory note, promising to pay to the order of the Gore District Mutual Fire Insurance Company £390 on demand; that the Gore District Mutual Fire Insurance Company then duly endorsed the same to the defendant, and the defendant then duly endorsed the said note to the plaintiffs. The declaration then averred presentment to Campbell, and nonpayment, and notice to defendant.

Then a count was added claiming for work done at the defendant's request in preparing policies of insurance, and for money due for premiums and assessments for insurance of the defendant's houses against fire; and a count on account stated.

Pleas.—To the first count—1, That the Gore District Mutual Fire Insurance Company did not endorse the note to the defendant as in that count alleged. 2, That the defendant did not endorse the note to the plaintiffs as in that count alleged. 3, Denying notice of non-payment. 4, A special plea, the plaintiffs' replication to which was demurred to. (a)

The case went down to trial at Brantford before McLean, J, upon the issues, and to assess contingent damages. The note was produced at the trial; it ran thus:

"On demand, for value received in Policy No. 4786, dated 6th of September, 1853, issued by the Gore District Mutual

Fire Insurance Company, I promise to pay to the order of said Company, at the office of the Company here, the sum of £390 currency.

(Signed) "D. F. CAMPBELL."

It was endorsed—

(Sans recours) "ALLAN GOOD, "Sec'y Gore Dist. M. F. I. Co."

"I hereby make myself responsible for the within.
"Thomas M. Simons."

It was proved that the note was given in order to obtain a policy of insurance for Campbell: that it came to Good, the secretary, from the plaintiffs' agent, and was returned to him by Good, with the remark that the rules of the company required a good endorser: that it was afterwards returned to him with the special endorsement by the defendant on the back; that he (Good), after he so received it, put his own name on it above the defendant's endorsement, as stated above.

Mr. Good swore that the policy had issued to Campbell on the security of the note before he (Good) put his name on it; that some losses having been sustained, and assessments made in consequence, Campbell, with others, was called on to pay his proportion as assessed by notice such as the law requires.

He did not pay, and witness soon afterwards spoke to the defendant about it. He said it was a hard case; that Campbell ought to pay it, but he supposed he would have to pay if Campbell did not, and he urged Good to make Campbell pay: he said, "If Campbell does not pay it, I suppose I must." Campbell was sued, and an execution against him returned nulla bona.

The property insured was merchandize and other chattels. A by-law of the company provides that in cases where no permanent lien can be created—as household furniture, merchandize, &c.—the directors may require an indemnity in lieu thereof by an approved surety on the premium note.

The witness had not the note with him when he demanded payment from the defendant. The endorsement by Good was made, as he admitted on the trial, since this action was brought.

The amount of assessment claimed from the defendant on

the note was £29 5s., for which the plaintiffs received a verdict by the defendant's consent, subject to the opinion of the court on any objection that could be urged to the plaintiffs' right to recover.

Burns, for the plaintiff, cited Peck v. Phippon, 9 U. C. R.

73; Wilders v. Stevens, 15 M. & W. 208.

D. B. Read, for defendant, cited 3 Wend. 94; Bishop v. Hayward, 4 T. R. 470; Jenkins v. McKenzie, 6 U. C. R. 544: Standage v. Creighton, 5 C. & P. 406; Borradaile v. Lowe, 4 Taunt. 93; Fletcher v. Froggatt, 2 C. & P. 569.

The statutes referred to are noticed in the judgment.

Robinson, C. J., delivered the judgment of the Court.

This note was properly made payable to the company, for the statute 6 Wm. IV. ch. 18, sec. 12, requires it to be so made. Then that being so, if there were no legal questions arising from the particular purposes for which the note was made, the first doubt that suggests itself is, whether the secretary could properly endorse it, or rather, whether his endorsement would transfer the property in the note. If he were the proper officer rather than the treasurer, I think, by analogy with the cashier of a bank, his endorsement would bind the company, and would be sufficient to transfer the note; and whether he was the proper officer or not, would depend upon what the corporation might by their regulations have authorized in that respect, or upon what they could be shewn to have allowed by general usage.

But the difficulty in this case is, that we cannot look upon this note as coming within the rules which apply to ordinary negotiable securities by the law merchant.

It is apparent on the face of it that it is a note given under the authority and for the purposes of the statute 6 Wm. IV. ch. 18, and intended to be retained by the insurance company with which it was to be deposited as a means of enforcing payment of such sums as it might from time to time become necessary to assess upon the maker of the note in consequence of losses sustained by the company.

We see, too, by the act, that five per cent. must have been paid on it when it was deposited, and that to allow it to be

treated as transferable by endorsement to a third party, like other promissory notes, would defeat the object of taking it, and would be doing a wrong to the maker of the note.

It is clear, we think, that the first statute contemplated no negotiation of such notes, nor that any third party was to be liable upon them as indorser; but in a subsequent statute (4 & 5 Vic. ch. 64, sec. 4) the following provision is made, which probably was introduced to meet some cases in which it was known that notes had been taken in some such manner: "Be it enacted, that nothing in the 12th section of the said act shall be construed to prevent any promissory note deposited with any mutual insurance company from being made payable to any officer of such company, or to any person or persons, for the purpose of being endorsed by such person or persons in favour of or to such company, or any officer thereof; and any such note, whether so deposited before or after the passing of this act, shall be valid and effectual, anything in the said act contained to the contrary notwithstanding."

Now this is not a note made legal by that clause; for it is not payable to any officer of the Company, or to any person other than an officer of the Company, but payable to the Company itself; and the question is, whether it can be treated as coming within the spirit, though not the letter of that provision, so as to make this defendant liable as an endorser in the ordinary form. We think not; and that the whole effect of that clause is, that a note may be made payable to the officer of a company instead of the company; in which case it is a note in effect payable to them, and to be deposited with the company and remain with them, to be acted upon in the same manner as if it had been made payable to them. And, moreover, the provision to which we now refer seems to be superseded by the last statute upon this subject (16 Vic. ch. 192, sec. 3), which requires the notes to be made payable to the company, and to remain deposited with them.

This note was made after the passing of that act; and if the intervening statute of 4 & 5 Vic. ch. 64, would have applied to this note otherwise, and would have made any difference in the plaintiffs' right to recover, which we do not think it would, yet we see that the last statute brings back these notes to the footing on which they had been placed by the first statute in regard to the form in which they are to

be given.

Then looking at this note as one given since the statute 16 Vic. ch. 192, and for the purpose of an insurance under the 6 Wm. IV. ch. 18, amended by the subsequent acts, we cannot, in our opinion, consider that the endorsement made by the secretary of the Company constituted a valid endorsement of this note, transferring it to this defendant with the ordinary consequences attending such an endorsement. Nor can we look upon the endorsement of the defendant as transferring the note to the Company, and as giving them a right to charge him with the ordinary liability of an endorser; yet the declaration puts the action on that footing, although the plaintiffs limit the demand to the small amount which had been assessed against the insured, and have consented to take a verdict for that.

There is, we apprehend, some necessity for further legislation upon the subject, if the intention of the statutes is, that these companies may take risks upon merchandize or other chattels, separate from the house or building in which they are kept, or to such an amount that the real property insured together with them is not of sufficient value to make a lien upon it good security for the whole.

As this case stands upon the declaration, the plaintiffs could not, in our opinion, recover. They have treated this as an ordinary note, endorsed to the defendant, and by him again, and upon which he is liable as endorser; whereas it is plain it was not endorsed to him, and could not be so as to give him the ordinary rights of an endorser, or throw on him the ordinary liabilities of an endorser, for it would have been a violation of the statute for the Company to have transferred it to any one. They were bound to retain it in deposit, to be dealt with as the statute directs.

And if the defendant could be liable, as the declaration assumes him to be, then he would be entitled to regular notice of nonpayment, which was not given; and what is relied upon as such a promise to pay as would cure the want of notice or delay in giving it, could not, in our opinion, be relied on as

sufficient for that purpose. It seems to us to amount to nothing more than an expression of his apprehension that he would have to pay.

If the plaintiffs have any remedy against the defendant, it is only, we think, by treating him as specially agreeing to guarantee the performance by Campbell of what he would be liable to do by law in consequence of having made that note; and that is the fair import of Campbell's special endorsement, and what alone could have been intended as between them and the Company.

Judgment for the defendant.

THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY v. SIMONS.

Mutual Insurance Companies—Premium notes—Demurrer.

Declaration on a promissory note alleged to have been made by one C., payable to the order of the Gore District Mutual Fire Insurance Co., by them endorsed to the defendant, and by the defendant to the plaintiffs. *Plea*, that the said Insurance Co. are the plaintiffs in this suit, and that the plaintiffs are the persons to whom said note is made payable, and who endorsed to the defendant, and are liable to him as such endorsers.

plaintiffs are the persons to whom said note is made payable, and who endorsed to the defendant, and are liable to him as such endorsers.

The replication shewed that the note was given by C. under the statute, on his insuring certain premises with the plaintiffs, to secure the due payments of the premiums or assessments in respect of his policy.

Held, on demurrer, that the replication was bad, or shewing the note not to be what the declaration would import.

The plaintiffs declared, for that whereas one Donald F. Campbell, on the 6th of September, 1853, made his promissory note in writing, and thereby, for value received, promised to pay to the order of the Gore District Mutual Fire Insurance Company, the sum of £390 on demand, and the Gore District Mutual Fire Insurance Company then duly endorsed the same to the defendant, and the defendant then duly endorsed the said note to the said plaintiffs; and the plaintiffs aver that afterwards, to wit, on the day and year aforesaid, payment of the said note was demanded of the said Donald F. Campbell, and the said Donald F. Campbell did not pay the same, of all which the said defendant then had due notice; whereby the defendant became liable to pay the amount of the said note to the plaintiffs, according to the tenor and effect thereof, &c.

⁽a) See Pickin v. Graham, 1 Cr. M. 725.

Plea-That the Gore District Mutual Fire Insurance Co. are the plaintiffs in this suit; and that the plaintiffs, and no other persons, bodies public or corporate, are the parties to whose order the said promissory note is made payable, and the parties who endorsed the same to the defendant, and who are liable to the defendant as such endorsers in the event of non-payment of the same by him; and this the defendant is ready to verify, &c.

Replication-That before the making of the promissory note in the first count of the declaration mentioned, to wit, on the 6th of September 1853, the said Donald F. Campbell in the said first count mentioned proposed to the plaintiffs to become and cause himself to be insured against loss by fire in the office of the Gore District Mutual Insurance Company, the above named plaintiffs, by a certain policy of mutual insurance, for the sum of £2500, on certain premises of the said Donald F. Campbell in the application for the said policy of insurance described, and which said policy of insurance thereinafter entered into by the plaintiffs, as hereinafter mentioned, is now in the possession of the said Donald F. Campbell, and thereupon afterwards, to wit, on the said 1st of September, 1853, and before the making of the said promissory note, it was agreed by and between the plaintiffs and the said Donald F. Campbell, at his request, that in consideration that the said Donald F. Campbell would make and deliver to the plaintiffs the said promissory note for the amount therein mentioned, and procure the defendant to endorse and become surety as endorser for the said Donald F. Campbell of the said promissory note, to secure the payment to the plaintiffs of the assessments or premiums to be levied and become payable, according and subject to the conditions of the said intended policy of insurance, they the plaintiffs would issue their policy, to cause the said Donald-F. Campbell to be insured in manner and for the amount aforesaid, and would accept the said promissory note so endorsed in lieu and stead of a deposit of money for and to secure the payment of such premiums or assesments so to be levied and become payable, according to the terms and conditions of the said policy as aforesaid, provided the said

Donald F. Campbell would procure the defendant to endorse the said promissory note to the plaintiffs as surety for the said Donald F. Campbell, to secure the due payment of such premiums or assessments as aforesaid; of all which premises the said defendant, before and at the time of the endorsing the said note as hereinbefore mentioned, had full notice, and assented and agreed thereto; and the plaintiffs aver, that in pursuance of the said agreement the plaintiffs did then, to wit, on the day and year aforesaid, issue their policy of insurance to the purport and effect aforesaid, and delivered the same to the said Donald F. Campbell, and the said Donald F. Campbell thereupon accordingly made and delivered the said promissory note to the plaintiffs, whereby he promised to pay the plaintiffs on demand the said sum of money therein mentioned, according and subject to the conditions of the said policy; and the plaintiffs further say, that they did then, in furtherance of the same agreement, and not otherwise, and without any consideration or value whatsoever in that behalf, endorse the said promissory note to the defendant as in the first count mentioned, to wit, for the purpose and in order that the defendant might, in pursuance and furtherance of such agreement, and not otherwise, endorse the same promissory note to the plaintiffs for the purpose of the defendant thereby becoming surety as such endorser for the due payment of such assessments or premiums to be levied and become payable in pursuance of and according to the conditions of the said policy of insurance, and for no other purpose whatsoever, and thereupon the defendant did then, for the purpose aroresaid, and not otherwise, endorse and deliver the same to the plaintiffs as in the said first count mentioned, and the plaintiffs did then accept and receive the same in lieu and stead of a deposit of money by the said Donald F. Campbell, for the purpose and on the terms aforesaid. And that no part of the amount of the said promissory note, or of the consideration for the insurance, has been paid to the plaintiffs, although an assesment was afterwards, and before the commencement of this suit, to wit, on, &c., duly levied or assessed thereon, and due notice thereof given to the said Donald F. Campbell, whereby a large sum of money, to wit, the sum of

£50, became due and payable according to the terms and conditions of the said policy of insurance so effected by the said Donald F. Campbell as aforesaid, of all which premises the defendant had due notice: verification.

Demurrer—That the replication affords no answer to the plea, and is a departure from the declaration, in this, that the declaration charges that the contract of the defendant was to pay the sum of money in the said note specified in the event of the maker thereof failing to do so on demand, and due notice given to the defendant; whereas the said replication set forth the contract as an agreement to pay on certain assessments therein referred to being made and remaining unpaid. That it is not alleged or shewn that the agreement respecting such note was in writing, and the plaintiffs are attempting to vary a written instrument by a verbal agreement not alleged to be contemporaneous therewith.

Burton, for the demurrer, cited Brown v. Langley, 4 M. & Gr. 466; Wilders v. Stevens, 15 M. & W. 208.

Burns, contra, cited Smith v. Marsack, 6 C. B. 486; Morris v. Walker, 15 Q. B. 589; Peck v. Phippon, 9 U. C. R. 73.

ROBINSON, C. J., delivered the judgment of the court.

We think that this replication cannot be sustained, for it shews the undertaking sued on not to be such as the declaration would lead us to suppose it was—that is, a promissory note for a certain sum of money, payable on demand, absolutely and at all events, which is essential to the character of a promissory note, such as can, according to the custom of merchants be transferred by indorsment: but was one intentionally made in pursuance of the statute 6 Wm. IV. ch. 18, secs. 12, 13, 15, 16, which the company are not at liberty to transfer by indorsement, but must retain in their hands to be dealt with in such a manner as the statute provides, and to be given up to the company under certain circumstances, when the proper time arrives.

We have already stated in what light we view these notes, in the judgment given by us in disposing of the points reserved at the trial (a).

This note, so to call it, was made properly payable to the company, who had no right to transfer it by endordement and never did in fact do that, or mean to do it.

The defendant's undertaking was special in its terms, and intended to be an express guarantee of Campbell's undertaking, and was of course only commensurate with Campbell's liability ns a member of the Mutual Insurance Company, by reason of his insurance.

It is not a note sanctioned by the amending statute 4 & 5 Vic. ch. 64, and it would have made no difference if it had been, because then it ought to have been endorsed to the company, which would have placed it at once under the operation of the statute of Wm. IV. It is under the late statute 16 Vic. ch. 192, that this note was given, and it would be altogether inconsistent with the third section of that act, to treat it as a promissory note, capable of being transferred to any third party in the ordinary manner by endorsement.

That, however, is the kind of a promissory note which the declaration imports, and yet the replication afterwards sets out such facts as shew it to be a different thing altogether, importing only in law a qualified and uncertain liability, under particular circumstances.

Judgment for the defendant on demurrer.

PERRY V. THE TOWN COUNCIL OF THE TOWN OF WHITBY.

By-law, form of rule Nisi to quash-Insufficient rate.

A rule Nisi to quash a by-law, obtained near the end of term, was made returnable eight days after service; the defendants appeared, and objected that the rule should have been to shew cause on a day certain. Held, that this objection, if fatal, was waived by the appearance.

The by-law in this case was clearly bad, the rate directed to be levied in the first year being insufficient.

M. C. Cameron, obtained a rule Nisi to quash by-law No. 18, passed on the 27th of November, 1855:

. 1. Because it does not fix a day within the financial year in which it was passed, when the same shall take effect.

2. Because the time is uncertain when it is to come into force, and the time during which the special rate is to be levied is also uncertain, and at all events no part of the sum required is to be raised in the year 1855.

3. Because it provides that if the rate imposed by it shall in any year be sufficient, the deficiency shall be made up from the general funds of the town, which funds cannot legally be so appropriated.

4. Because the rate of $5\frac{1}{4}d$ in the pound, thereby required to be levied annually, will be insufficient for the first year of the ten to pay £125 and interest on the whole sum unpaid,

as required to be paid by law in that year.

5. Because the sum, £7127 10s. 5d., was not the amount of ratable, property in the town of Whitby, ascertained by the assessment returns of 1854, and there were no such returns for that year for the town of Whitby; and the persons voting at the general meeting of qualified electors for considering the said by-law were taken from the assessment rolls of 1855, and not from the collector's roll for 1854.

The by-law was passed for raising £1250 by way of loan, for the purpose of purchasing the site of a market, and defraying the cost of erecting market buildings thereupon, in

the town of Whitby.

It recited that it was advisable to purchase certain lands specified, for the purpose of erecting market buildings thereon, and that it was expedient to raise by loan a sum sufficient to pay for the land, and for erecting the buildings, being £1250; that the whole ratable property of the town of Whitby for 1854, was £7127 10s. 5d.; that the annual rate in the pound required as a special rate for the payment of the interest, and the creation of a sinking fund for the principal, of a loan of £1250, is $5\frac{3}{4}d$. in the pound.

And it then enacted, that it should be lawful for the Mayor of the town to raise by way of loan, at a rate of interest not to exceed six per cent. per annum, upon debentures and the special rate thereon imposed, a sum of money not exceeding in the whole £1250, to be applied to the purposes mentioned.

2. That the Mayor might issue debentures for £1250, in sums not less than £25 each, dated on the day on which they should issue, and payable at the several and respective periods 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 years; and that no greater sum than £125 of the principal, being one-tenth part of the said loan, should be made payable in any one year,

and the interest half yearly on such parts of the principal as remained unpaid, said debentures to be made payable at the agency of the Bank of Montreal, in Whitby.

3. That for payment of the debentures and interest there should be assessed, &c., upon the assessed value of all the ratable property in the town, over and above all other rates and taxes, a special rate of $5\frac{3}{4}d$. in the pound annually from the year 1856 to 1865, both years inclusive; provided always, that if the rate in any one year should prove deficient for the purpose aforesaid, such deficiency should be made up from the general fund of the town.

Wilson, Q. C., shewed cause, and objected that the rule nisi, having been taken out too late for obliging the Municipality to answer it during last term, not being drawn up till the last day but one of the term, ought to have been made returnable on some certain day in this term, in order that the Municipality might know when they could be called upon to answer it. He cited Mitchell v. Foster, 12 A. & E. 472; Smith v. Collier, 3 Dowl. 100; Arthur v. Marshall, 13 M. & W. 465; Sells and The Municipality of St. Thomas, 3 C. P. 286.

M. C. Cameron supported the rule.

Robinson, C. J., delivered the judgment of the court. The statute 12 Vic., ch. 81, sec. 155, as amended by 14 & 15 Vic. ch. 109, sched. A. 21, directs that the rule shall be made "to shew cause within not less than eight days after service.

We cannot tell certainly whether the legislature meant by this that the rule should be drawn up exactly in these terms, or should appoint some day for shewing cause, which should not be less than eight days after service. The language of the clause is rather inaccurate in using the word "within;" what was meant was, not that the defendants should be called on to shew cause within not less than eight days, but that not less than eight days must elapse.

This rule was drawn up to shew cause eight days after service, not naming any day, but the Municipality must be supposed to know that cause could only be shewn in term, and they appear to have been aware that they must shew cause in the next term, for they did appear and answer, though they objected.

We think the appearance is a waiver of any objection in respect to the return, for the rule has had its effect. In the cases cited by Mr. Wilson the party served with the rule had not appeared, and the rule had been made absolute in his absence, and the question was, whether it was regular to make it absolute.

It would be to be regretted if we unnecessarily caused delay by giving way improperly to the objection; for generally speaking, when a by-law is such that we cannot refuse to quash it, it is desirable that it should be quashed as soon as possible.

It seems too clear to be doubted that this by-law is illegal, in not conforming to that condition of its validity which is expressly imposed by the 177th clause of 12 Vic., ch. 81; namely, that it shall contain authority for levying a rate sufficient in each year to pay the interest on the debt and that portion of the principal which is to be paid off within such year. It is clear, and is admitted, that the $5\frac{1}{4}d$. in the pound on the sum stated in the by-law to be the value of ratable property within the Municipality would not produce such an amount as would cover the payment which under the by-law is appointed to be made within the year; but considerable less. It will be found, I think, to come short by about £30.

And the manner in which the by-law provides for making up any deficiency that may arise in the payment, even if it were clearly legal, would still not cure the objection, for the statute expressly requires that the rate imposed shall be in itself sufficient to cover it upon the basis of calculation assumed, and if not, it declares that the by-law shall be void.

Rule absolute.

FINN ET AL. V. MORRISON ET AL.

Replevin-Evidence of seizure.

Replevin against a landlord and his bailiff for goods seized under a distress. It appeared that the bailiff had gone to the plainitffs' store, who told him to proceed and they would replevy, and they requested him to seize some barrels of spirits, which he did, and afterwards advertised them for sale in the usual manner: he did not touch the casks, or leave auy one in possession, or take security for their production at the time of sale, relying, as he said, on the plaintiffs' assurance, and knowing that they intended to replevy. Held, a sufficient seizure.

REPLEVIN.—Pleas 1. Non cepit. 2 and 3, Avowry under distress for rent.

Pleas to the avowry, denying the tenancy, and that there was rent in arrear. Also, as to part of the rent, that it was not due, as to the remainder tender—Issues thereon.

At the trial at Hamilton, before Richards, J., it appeared that the bailiff Morrison, one of the defendants, went with a warrant from Stinson, the other defendant, to restrain for rent claimed by Stinson from the plaintiffs', his tenants, and after making a seizure of some things not now in question, the bailiff was given to understand that a portion of the rent claim was disputed. £43 was paid to him, and the tenants told him that as to £19, the remainder of the sum distrained for, they claimed a right to deduct that as the amount of the taxes which they had paid, and which they contended it rested with the landlord to pay.

The bailiff then applied to the attorney of the landlord for instructions, and was told that he must go on and levy the rent; and on his going again to the plaintiffs, they told him that he must then proceed and they would replevy, and they pointed out five barrels of spirits, which they said would be sufficient to cover the rent, and requested him to seize them, which the bailiff did, and advertised them for sale in the usual manner.

He did not actually touch the casks of spirits, nor leave any one in possession of them, nor take any security that they should be forthcoming at the time of sale, relying, as he said, upon the plaintiffs' assurance that they would be, and knowing moreover that their intention was to replevy.

At the trial of the replevin suit, it was objected by the defendants—i. e., the landlord and the bailiff—that under the

circumstances described there was not such a taking of the goods as was sufficient to sustain the action, at all events against the landlord; and the plaintiffs accepted a nonsuit with leave to move against it. *Burton* obtained a rule Nisi accordingly, to which *Spohn* shewed cause.

Leith supported the cause, citing Swann v. The Earl of Falmouth, 8 B. & C. 456.

ROBINSON, C. J.—It appears to me that what occurred here was sufficient to constitute a seizing of the goods. There is no necessity for a corporal touch, where the goods are in sight, and where the tenant points them out as his, asserting that they are liable to be seized, and requesting that they may be considered to be seized as distress for the rent.

Such a manner of executing such process is not unusual. It saves the inconvenience and exposure that would sometimes occur if the bailiff were left to act as against a resisting party, who would take no part, and do nothing towards facilitating the execution of the process in a manner least disagreeable as regards the officer and himself.

The same also may be said as to the not removing the goods from the premises, nor taking them into actual possession during the period that must elapse before sale.

I apprehend that less than was done in this case has been held sufficient to constitute a seizure as between the bailiff and the owner of the goods, against whom the process was; and if so, then I am of opinion that the landlord, for whom the bailiff was acting, is bound by the seizure, and is under the necessity of justifying it. I refer to Hutchins v. Scott (2 M. & W. 809.)

McLean, J.—In this case I was at first inclined to consider that the distress had been abandoned, and that it was very doubtful if a proper levy had been made; but on further examination of the circumstances, I have come to a different conclusion, and have satisfied myself that it is not essential to a seizure of goods under execution or for a distress, that the sheriff or bailiff should touch the goods, or that he should remove them, or put any one in charge of them. A seizure

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would be perfectly good, if submitted to by the owner of the goods, as between the owner and the party seizing, and the owner could not afterwards object to the goods being taken away to be sold in pursuance of the seizure. In this case it is established that a warrant to distrain the plaintiff's goods for £62 10s. 0d., was issued by the defendant Stinson, and placed in the hands of the other defendants as his bailiff; that under that warrant some chests of tea were nominally distrained by the bailiff, but that he then declared to the plaintiffs he would do nothing more in the matter without advice, and went away, and left the tea where he had found it. That warrant was received from a Mr. Thompson, an attorney acting for Stinson, and upon it the defendants paid a sum of £43 2s. 6d. on account of the rent, being the whole amount claimed except £19 17s. 6d. which the defendants disputed on account of taxes paid by them, but which Stinson was unwilling to allow to them on that account. The bailiff again returned to the defendants' store, with instructions from Mr. Thompson to distrain for the amount in dispute, and the plaintiffs then pointed out five barrels of highwines to him on which to levy, as sufficient to cover the sum claimed. The bailiff then gave to the defendants a formal notice of the seizure, and that unless the goods were replevied or the rent paid, the property would be sold to satisfy the He also gave notice of a sale of the goods at public auction, at the instance of Stinson, for rent claimed to be due to him; and from these notices, dated 21st of December, it would appear that the whole sum of £62 10s. 0d. was claimed, though £43 2s. 6d. had been paid on the 6th of that month to the defendants, as appears by the bailiff's statement. The bailiff placed no one in charge, and took no guaranty that the goods should be forthcoming beyond the assurance of the defendants to that effect; but he stated that he did not intend to abandon, and did not abandon the distress, and that if the goods had not been replevied he would have gone back to the plaintiffs', and sold them pursuant to his levy. The plaintiffs had told the bailiff on his making the distress that they would replevy, and they accordingly did so, and having given the usual bond, brought this action to

determine the right of Stinson to destrain .- in the case of Hutchins v. Scott (2 M. & W. 809), a landlord's broker went to the tenant's house and pressed for payment of rent and £3 3s. 0d., expenses of a levy, but touched nothing and made no inventory: the tenant paid the amount under protest, on which he withdrew: in an action against the landlord for an excessive distress, it was held that defendant could not say there was no actual distress. A distress having been made by the bailiff, the landlord cannot be at liberty, after issuing a warrant to him, to repudiate or adopt his proceedings as he may think proper. He is bound by the acts of his agent, and having directed him to levy for the amount in dispute, the defendants submitted to have five barrels of highwines taken in the name of a distress. The seizure was much more apparent in this case than in the case to which I have referred, and if this was an action for an excessive distress, it could undoubtedly be sustained on the authority of that case. The bailiff could not say, and did not say, that there was no distress made; on the contrary, he said expressly in his testimony that he had made a distress, and would have sold if the goods had not been replevied. The plaintiffs were bound to proceed in this action, and the defendant Stinson cannot get rid of it on the ground that there was nothing shewn to connect him with the levy on the high wines, because the warrant is admitted to have been signed by him. At all events, I think there was sufficient evidence to go to the jury of a levy by the bailiff at the instance of Stinson, acquiesced in by the plaintiffs, and that the nonsuit must be set aside.

Burns, J., concurred.

Rule absolute.

READ V. THE MUNICIPAL COUNCIL OF THE COUNTY OF KENT.

Registry books-Liability of County Council for-16 Vic. ch. 187, sec. 3.

A., the registrar of Kent, applied to G., the registrar of Huron, to order books for his office: G. ordered two books from the plaintiff in A,'s name, and these were charged to A; three others were afterwards furnished, which the plaintiff charged in his books to "The County of Kent, for Mr. A." Held, that the plaintiff had no right of action against the County Council.

Assumpsit for goods sold and delivered, and upon an account stated. Plea, non-assumpsit.

At the trial, before Burns, J., at the last assizes held at - London, the facts appeared to be these: The late Mr. Ackland had been appointed registrar for the county of Kent, and at the time of his appointment the office required books for the registry. Mr. Ackland applied to Mr. Galt, the registrar for Huron, to order what books would be requisite, and to assist him to put his office in order. Mr. Galt did order books from the plaintiff for the registry, and ordered them in Mr. Ackland's name; and Mr. Galt said he supposed the plaintiff gave credit to Mr. Ackland, for it was usual, he said, for the registrar to purchase books, and for the treasurer of the county to repay him. The plaintiff furnished at first two books at £5 each, and the original entry of those was against Mr. Ackland. Subsequently three books were furnished, at £15 4s. 6d., and the entry made in the plaintiff's books was, "The County of Kent for Mr. Ackland." After Mr. Ackland's death another book was ordered, at £5 10s., and the entry of that was, "The County of Kent for Mr. Knapp," (the newly-appointed registrar.) The last mentioned book was paid for by Mr. Knapp, and repaid to him by the treasurer of the county. The amount of the first two books was not paid, but the second bill, £15 4s. 6d., was paid to Mr. Ackland by the treasurer of the county on the 4th of April, 1854, and a few days after that Mr. Ackland died, without having paid the plaintiff. The plaintiff rendered an account of the five books in Mr. Ackland's name. At the time the County of Lambton was set off from the County of Kent, one of the five books was delivered to the registrar of Lambton, with the extracts which the statute requires in such cases; but the plaintiff knew nothing of that, and had nothing to do with it. The plaintiff said when the books were sent that he would supply the county, but not Mr. Ackland.

It was objected, on the part of the defendants, that the plaintiff could not recover, first, because it was not shewn that the registrar was authorized by the Municipal Council to make the purchase of the books; secondly, because no contract under seal was proved, in order to bind the corporation.

The jury were asked to find whether the credit was given by the plaintiff to Mr. Ackland or to the county, and they found that the books were furnished by the plaintiff on the credit of the county. Upon this finding the learned judge directed the verdict to be entered for the plaintiff for the amount claimed, £27 5s., subject to the opinion of the court whether the verdict should be entered for the defendants generally, or be reduced to £10, the price of two books, if the £15 4s. 6d. could be considered to have been paid; or reduced further to £5, if the County of Kent was not liable for the price of the book which the County of Lambton obtained.

The case was argued by John Wilson for the plaintiff, and by Becher for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

If the statute on which the plaintiff relies for supporting this action had been at hand to be referred to on the trial, we think there could have been no hesitation in determining that he could not succeed.

The plaintiff, of course, could not enable himself to recover against the defendants by shewing that he had at the time charged the articles to them in his own books, or had delivered accounts against them for the price. It was not with such a view the evidence was given; and indeed, so far as it did go, it rather established a case in favour of the defendants than against them.

It is clear from the evidence that the defendants neither directly nor in any manner gave an order upon the plaintiff to furnish the books, and therefore the case wholly rests upon the effect of the statute 16 Vic. ch. 187, sec. 3, in making the county liable; and it was argued upon that ground.

The provision is, that "whenever a registrar shall require

a new registry book, the same shall be furnished to him by the treasurer of the county, on his application therefor, and shall be paid for by such treasurer out of the county funds; and if such treasurer shall refuse or neglect to furnish such book within thirty days after the application of the registrar, the registrar may provide the same, and recover the cost from the municipality of the county."

It was not proved that Mr. Ackland, the registrar, had ever applied to the treasurer of the county for the necessary books, and there could not therefore have been that refusal or neglect to furnish them after application which would entitle the registrar to procure them himself; and if there had been, the consequence, according to the act, would have been, not that the person furnishing them could have sued the county, but that the registrar, when he had bought and paid for the books, could have recovered the amount from the county. Whether, however, in such a case, to prevent circuity of action, the person furnishing the books could have sued the county, is not necessary to be determined in the present case, because here the facts were different. Mr. Ackland did not afford to the treasurer of the county an opportunity to procure the books, but went directly in the first instance, and selected such as suited him, and bought them where he pleased.

This was not what the statute authorized, and therefore no right of action can be created under the statute. And the distinction is not an idle one; for we see that the county here, having paid the treasurer for three books out of the five, would have to pay twice for those books if they should be held liable in this action; and this could not have happened if the provisions of the act had been attended to and followed out, for then they would have either bought them themselves and paid for them, or would by their neglect to buy them have rendered themselves liable to the registrar when he had paid for them, but not before.

No person looking at the clause of the statute could have any right to conclude from it that he could hold a county liable for registry books which were not ordered by the council or the treasurer, or by any authority from one or the other. A verdict should, in our opinion, be entered for the defendants.

Judgment for defendants.

FULLARTON V. SWITZER AND FIGG.

Action against justices—Form of—16 Vic. ch. 180.

One A. went before the defendants, two justices, and swore that the plaintiff had insinuated to the agent of an insurance company that he, A., would set fire to his own building, and that from this and other circumstances he was afraid that the plaintiff would destroy his property, and he therefore prayed that he might be bound over to keep the peace; the defendant thereupon required the plaintiff to enter into a recognizance with sureties, and on his refusal committed him to gaol. The plaintiff having sued them in trespass—Held, that the 16 Vic. ch. 180, clearly applied, and therefore only a special action on the case could be maintained.

TRESPASS for assault and false imprisonment. Pleas, by the defendants severally, "Not guilty," by statute.

The defendants were justices of the peace for the united counties of York and Peel. On the 18th of June, 1855, one Atchinson went before the defendant Switzer, and made oath that the plaintiff Fullarton did, in or about the month of January, 1854, insinuate to the agent of an insurance company in Toronto that he, Atchinson, would set fire to his own buildings, and by that means he stopped the insurance on his, Atchinson's, property; and that from that and other circumstances and conduct of the said Fullarton towards him, he was afraid that Fullarton would destroy his property, and therefore prayed that the said Fullarton might be required to find sufficient sureties to keep the peace, and be of good behaviour towards him the said Atchinson; and the informant swore further that he did not make the complaint, nor require sureties, from any malice or ill will, but for the preservation of his person and property from injury.

Upon this information the two defendants, acting together as justices, required the plaintiff to enter into a recognizance, himself in £500, with two sufficient sureties in £250 each, as well for his appearance at the next general quarter sessions of the peace, to be held for the said united counties, to do what should then and there be enjoined upon him by the court, as also in the meantime to keep the peace and be of good behaviour towards her Majesty and all her liege people, and especially towards the said William Atchinson. And the plaintiff having refused or neglected to give such sureties, the defendants, as justices, made their warrant to a constable to take him to the common gaol, and gave in the same warrant

authority to the gaoler to receive him into custody upon their commitment—which recited the information, and their call upon the plaintiff to find sureties, and his refusal or neglect to do so—and to detain him until the next quarter sessions, unless in the meantime he should find sufficient sureties, &c.

Upon these facts being shewn at the trial, the defendants contended that they were entitled to a verdict; for that they, the justices, having jurisdiction over the subject matter, could not, since the statute 16 Vic. ch. 180, be sued as trespassers, but were only liable, if at all, in an action on the case charging them with having acted from malice.

The learned judge reserved the point, directing the jury to assess such damages in the meantime for the plaintiff as would compensate him for the imprisonment, if it were illegal, and if this action could be sustained.

Hallinan obtained a rule nisi to enter a verdict for the defendants on the leave reserved, or for a new trial for misdirection.

Dempsey shewed cause.

ROBINSON, C. J., delivered the judgment of court.

We all think it clear that the verdict should be entered for the defendants on the leave reserved. The justices had clearly a general jurisdiction by law over the subject matter in which they were acting—that is, they have authority to bind parties to keep the peace and be of good behaviour; but they should be careful to see that they do not hold them to give such security upon insufficient grounds, because if they should do so from an error in judgment, then, although they have a general jurisdiction over the subject matter, they would be doing what is wrong in the particular case, and may subject themselves to an action, which however, in such a case, it is quite clear, must, since our statute 16 Vic. ch. 180, sec. 2, be an action not of trespass, but of trespass on the case, in which malice must be averred and proved. Nothing can be clearer than the language and intention of the statute in this respect, and the provision is a just one, and gives only a due measure of protection to the magistrate, who is often called upon suddenly in the discharge of difficult and responsible duties, in which, with no bad intention, he may easily fall into error.

There is no question here about quashing the conviction, for there was none, and none was called for by the nature of the complaint. The plaintiff was not committed for punishment, nor intended to be so committed.

Rule absolute, to enter verdict for the defendants.

IN RE SHADE AND THE GALT AND GUELPH RAILWAY COMP'Y.

Mandamus to appoint arbitrator—Nature of claims which may be arbitrated on. Applications were made, on behalf of A. & B., for a mandamus to the Galt and Guelph R. W. Co. to compel them to appoint an arbitrator on their part, to determine upon the compensation due for damages in reference to certain injuries specified in the notices which had been previously served upon them.

It appeared that the heads of claims made by A, were for consequential damages, chiefly from alleged omissions, and for negligent and improper conduct of the company in the construction of their work; or for alleged consequential injury to the property of the claimant, over which the railway passed. Held, that these were not proper subjects for arbitration

under the statute.

In B.'s case the claim was for injury occasioned by the construction of the railway upon land of which he was at the time in occupation as lessee; and a mandamus was granted, as it was not clear that he could recover

for such damages by action,

In the first of these cases, D. B. Read obtained in last Trinity term a rule on the Galt and Guelph Railway Company, to shew cause why a mandamus should not issue commanding them to appoint an arbitrator, who in conjunction with two other arbitrators to be appointed according to law. (specifying in the rule the mode of appointment) should award what sums of money the Railway Company should pay to the claimant Shade, for the damages which he might be entitled to receive in consequence of the railway being constructed upon his lands; or to determine or award such matters as should be submitted to them in respect to the premises by the said Shade and the Company, under the railway acts applying to the said Company; especially concerning the matters referred to in a written notice addressed to the said Company on the 24th of July, 1855, on the part of the claimant Shade, and served on the president of the Company on the 25th of July.

The notice referred to in the rule stated that the claimant had appointed Thomas Rich, Esq., the arbitrator on his behalf, for investigating and awarding the amount of his claim upon the Company for damages for overflowing his lands with water, obstructing and altering the stream running over and through the same, exposing and injuring his crops, destroying and taking away his fences, destroying the approaches to and covering his land with earth, sand, stones, and rubbish; and it called upon the Company to appoint an arbitrator on their part.

The notice was accompanied by a specification of the claim which in substance was:

1. For injuring pasture by throwing open fields and not fencing the railway track, and expense of keeping a man to watch his fields and put up fences, which the Company had agreed to do.

2. For damage from a embankment obstructing the approach to four town lots in Galt.

3. For damage from the Company not making their embankment in such a manner as to turn the water of the creek into its new channel made by the Company, as proposed and shewn on their plan, and not making a ditch along their embankment to carry off the water running through the embankment, in consequence of its not being made tight.

4. For not making their new cut of sufficient depth to carry off the water in spring and fall, in consequence of which the claimant's land was overflowed; and for not making embankments in low places to confine the water within its channel, as had been done on the banks of the creek before the work was commenced.

5. For damage done to village lots in consequence of the railway track running in front of them, and thereby rendering them less valuable.

6. To compel the Company to make the necessary farm-crossings, and complete the fencing and other work necessary to prevent the continuance of the damage complained of. No amount of damages was specified.

It was sworn by the attorney of the claimant, that the claimant was the owner of land in the village of Galt, over

which the Company had constructed their railway: that on the 25th of July last he served the president of the Company with a true copy of the notice: that on the 20th of August he asked the president of the Company if he or the Company would name an arbitrator to investigate and settle Mr. Shade's claims, to which the president replied that the Company had not and would not appoint an arbitrator; that they intended to let the claimant sue for his damages, and they would gain by it.

He swore also that the claimant had sustained damage to his land and property, in consequence of the Company running their line of railway across his land.

In McNaughton's case a rule was obtained on similar terms, except that it described his claim for damages as being in consequence of the railway being constructed upon lands of which the claimant was lessee and occupier during the construction of the said railway, and in consequence of his being deprived during that time of certain privileges connected with his occupation of the said lands and premises, and which before then he had enjoyed.

In addition to the claim thus specified, the rule contained the same estimate of claim for damages in general terms as the rule in Shade's case.

The notice in this case was served on the same day as the last, and stated that the claimant had appointed Thomas Laurie his arbitrator, to award upon the amount of damages which he should be entitled to receive "for taking and interfering with the possession of his property leased by him from the executors of the late David Thompson, obstructing and taking away the water from his mills, distillery, and the stoppage of the same, and taking the line of railroad across his dam, lessening the amount of water, and the facilities and power of driving the mills, and other injuries consequent thereon."

In the specification of his claim he claimed damages:

1. For filling up his mill-dam, and taking the creek out of its channel, thereby causing a loss to him in grinding of 1,800 barrels of flour at 6s. 3d. a-barrel, amounting to £562 10s.

2. For damages to his hog-yard and other premises, by carrying the railway track across the same, £75 cy.

An affidavit of his attorney was filed, stating that on the 25th of July last he served the president of the Railway Company with a copy of the notice; that McNaughton, the claimant, "was the occupier of a grist-mill and distillery, and oat-mill, with mill-dam and mill-yard, in Galt," rented by him from the executors of the late David Thompson; that he was in possession of the same during the time that the Company placed their railway across the dam and premises; that the claimant had sustained damages in consequence of the railway crossing his dam and premises so occupied as aforesaid; and that on the 20th of August the defendant applied to the president of the Company to know if he or the Company had appointed an arbitrator, and received for answer that the Company did not intend to appoint or to arbitrate with the claimant, and that he might sue for his claim.

In each of these cases an affidavit was made by Mr. Miller, the attorney for the claimant, that there was a disagreement between the claimant and the Railway Company as to the amount of damages claimed in respect to the matters referred to in the notice served.

Wilson, Q. C., shewed cause, and cited Crisp v. Bunbury, 8 Bing. 394; Rex v. Mildenhall Savings Bank, 6 A. & E. 952.

Read, contra, cited Regina v. North Midland R. W. C., 2 R. W. Cas. 1; Regina v. London and South Western R. W. Co., 5 R. W. Cas. 669; Regina v. London and Blackwall R. W. Co., 4 R. W. Cas. 119; Evans v. Lancashire, &c., R. W. Co., 1 E. & B. 754; Regina v. The Sheriff of Middlesex, 3 R. W. Cas. 396; Bradley v. Great Western R. W. Co., 11 U. C. R. 220; Regina v. South Eastern R. W. Co., 17 Jur. 901; Shelford on Railways, 304-5.

Robinson, C. J.—For determining the question before us on these rules, it is not necessary to look at any other statute relating to the Great Western Railway Company than the first statute, 4 Wm. IV. ch. 29. I see nothing in any subsequent acts that can affect the question.

It is sworn in Mr. Shade's case that the notice which he served upon the Company was accompanied by a specification

of his claim, such as is now laid before us. There has been therefore no other claim upon which the Company has been required to go to arbitration; and it appears that all those heads of claim are for consequential damages, chiefly from alleged omissions, and for negligent and improper conduct of the Company in the manner in which they have constructed their work; or for alleged consequential injury to the property of the claimant, over which the railway is not constructed.

It does not appear to me that any of these are proper subjects of arbitration under the statute 4 W. IV. ch. 29; and therefore on this application we cannot grant a mandamus, but must leave the party to his remedy by action.

In McNaughton's case, it appears that he has given notice of claim, and does claim, for injury occasioned by the railway being constructed upon land in which he had a legal interest at the time. And as there may be doubt whether he is in a situation to recover in an action (by reason of the 11th clause of the act) for any such direct injury arising from the construction of the railway upon land so being at that time in his occupation, we grant a mandamus in his case. We of course take it for granted that the arbitrators will only entertain such claims as they shall find come properly within the reference; and the mandamus must be carefully so framed as not to mislead in that respect. It should follow the exact words of the statute, stating what is to be awarded upon.

Burns, J.—The different clauses of the different acts incorporated with the act chartering this Company, in my opinion, do not contemplate a right or an obligation to claim or refer to arbitration any matter except in respect of that which the Company may require for the construction of the railway. The third section of 4 Wm. IV. ch. 29 provides for arbitration, if the Company cannot purchase, as to so much land and privileges as they shall require, or for the damages which the owner may be entitled to receive, in consequence of the road being made and constructed in and upon the owner's land. The 11th section does not enlarge the other in any way, but is in accordance with it. The 26th

section of 9 Vic. ch. 81, enacts, that whenever any lands or grounds are required by the Company for the purposes of the the railroad, the sum to be paid for such lands, if it cannot be agreed upon, may be referred in the manner therein specified. Then the 5th section of 16 Vic. ch. 99 enacts, that if any dispute or disagreement shall arise between the Company and the owner or occupier of any land or ground, or privileges appertaining thereto, which may have been taken by the Company, or which may be taken or required by the Company, for the uses or conveniences of the road, a tender of the value may be made, and if no greater sum be recovered by arbitration or suit, then the owner or occupier shall pay costs. The items of claim made by the applicant do not shew that the Company have taken or required anything from him in the construction, or for the uses or conveniences of the road. All that he claims is, that the works constructed by the Company have injured other property of his. If he has a legal right to compensation for an injury, which the Legislature has not deprived him of by the powers conferred upon the Company, he must resort to his suit, the same as he would do against an individual for a similar injury.

DRAPER, J., concurred.

Rule discharged in Shade's case. Rule absolute in McNaughton's case.

IN RE MILLER AND THE GREAT WESTERN RAILWAY COMP'Y.

Great Western R. W. Co.—Arbitration—Rights allowed for not within the submission—Uncertainty—Extravagance of sum awarded.

The deed of submission, recited in the award, stated that the Company "had set out and taken for the uses of the road a portion of M.'s land, being all his land lying immediately north of the land theretofore conveyed by him to the Company;" and the award determined "that the value of the lands so set out and taken as aforestid is," &c. Held, that the land to be taken by the Company was sufficiently described.

The award, however, was set aside. 1. Because the arbitrators in valuing the land, which bordered on the water, allowed a large sum for the water frontage, to which the owner had no legal or equitable right, but merely a supposed claim on the favourable consideration of the government to grant it to him. 2. Because the award did not transfer any such claim to the Company, if the arbitrators could legally have allowed for it.

Quære, whether the sum awarded was not so extravagant as in itself to vitiate

the award

Queere, also, whether after an award has been made, the Company can relinquish the land valued, and claim exemption from compliance with it.

Becher, last term, obtained a rule on the part of the

Great Western Railway Company, calling on Miller to shew cause in this term why the award made between him and the Company should not be set aside, on the following grounds, beside others, which upon the argument were not insisted on:

- 1. For wrongfully and unfairly refusing to express in the award the quantity, description, and extent of land, and the rights and privileges awarded upon, or the estate or interest of the claimant therein.
- 2. Because the arbitrator's received improper evidence, and awarded as part of the value of lands and rights referred to them for valuation the value of other lands, rights and privileges, not belonging to the claimant, and to or over which he had no right, and which were not included in the submission, or intended so to be.
- 3. Because they did not take into consideration the benefit conferred on the property on which they arbitrated, but unlawfully and improperly awarded an extravagant and excessive amount therefor.
- 4. Because the award is uncertain, the lands, rights, and privileges therein appraised and awarded upon not being described by boundaries, or by quantity or situation, or otherwise; and because it does not appear in the award whether the same are situate in any city, town, township, or county in this province, or out of it; and the quantity of interest or estate valued by the award is not set forth.
- 5. Because it is not final and conclusive as to the damages referred to them to estimate, and does not cover the matters referred to, and is incomplete and uncertain, in this, that it declares the claimant entitled to receive five shillings in satisfaction of the loss which he may sustain by the said land being taken from him, without awarding or defining that such five shillings is the *amount* of such damage, or that there may be, or was any damage.
- 6. Because the arbitrators have exceeded their authority, in directing that the Company shall pay the sums awarded to the claimant.

The award complained of was made upon the submission contained in the following agreement:—

"Articles of agreement made and entered into the 7th of February, 1854, between the Great Western Railway Company, of the first part, and Andrew Miller, of the City of Hamilton, Esq., of the second part; whereas the said company have set out and taken for the uses of their road a portion of the lands of the said party of the second part, being all the land of the party of the second part lying immediately north of the land heretofore conveyed to the said Company by the said party of the second part, together with the rights, privileges, advantages, and appurtenances thereto belonging; and disputes exist between the parties as to the value of the lands, rights, privileges, advantages, and appurtenances so set out and taken as aforesaid, and as to the amount of damages the said party of the second part may sustain by reason of the same being taken from him. Now these presents witness, and it is agreed between the said parties, that the said disputes and differences shall be, and the same are hereby referred to the arbitration of Robert Spence, of Dundas, Esq., John B. Dayfoot, of Hamilton, merchant, and John Winer, of the same place, merchant, according to the several acts of Parliament in that behalf, or any of them, being a majority thereof; and the award of the said arbitrators, or a majority of them, if made in writing under their hands, ready to be delivered to the parties thereto, or such of them as may require the same, on or before the 31st day of March next, shall be binding and conclusive on the said parties; and the said arbitrators, or a majority of them, shall have full power to enlarge the time for making their award to such time or times as they shall appoint, and shall also be at liberty to examine the said parties in difference, or either of them, and such other witnesses as they shall think proper, on oath; and that for the better enforcing the performance and observance of such award, the reference and submission hereby made shall be made a rule of Her Majesty's Court of Queen's Bench, according to the statute in such case, &c. In witness whereof," &c.

The time for making the award was enlarged from time to time by the arbitrators until the 1st of September, 1855.

On the 27th of August, 1855, Dayfoot and Winer made their award in writing, which, after setting out the submission fully and correctly, and stating that they had enlarged the time to the 1st of September, 1855, was in these words:—

"Now know ye, that we, the said Robert Spence, John B. Dayfoot, and John Winer, having been duly sworn pursuant

to the statute, and taken upon ourselves the burthen of the said reference and submission, and having heard and considered the allegations of both the said parties, and having examined all such witnesses as were produced before us concerning the premises, do thereupon make this our award in writing, in manner and form following—that is to say, we award, order, adjudge, and determine, that the value of the land, rights, privileges, advantages, and appurtenances, so set out and taken as aforesaid, is the just and full sum of eleven thousand and three hundred pounds of lawful money of Canada; and we do order and direct the said Company to pay the said sum of eleven thousand and three hundred pounds to the said Andrew Miller, within three months from the date of this our award. We further award, order, and adjudge, that the said Andrew Miller is entitled to receive of and from the said Company the sum of five shillings, in satisfaction of the loss which he may sustain by virtue of the last mentioned land being taken away from him; and we order and direct the said Company to pay the said sum of five shillings to the said Andrew Miller, within three months from the date of this our award."

The award purported to be the award of the three arbitrators, but it was signed only by Dayfoot and Winer. It was dated the 27th of August, 1855.

It was not shewn by anything before the court at what time the Company first intimated to Miller their desire to take the piece of land in question, which was described by the Company's solicitor as containing about 3 of an acre, or at what time they did actually occupy it, and what use they had made of it, or what change in its condition, either making it more or less valuable and convenient to the proprietor, if it should be resumed by him. It was, however, recited in the articles of submission, which were dated the 7th of February, 1854, that the Company had then set out and taken for the uses of their road all the land of Miller lying immediately north of the land which he had before conveyed to the Company; and that they had at that time had disputes as to its value, and as to the damages which Miller would sustain by such land being taken.

Although the submission was signed in February, 1854, there seemed to have been no meeting of the arbitrators till

the 26th of June following, when evidence was taken on the part of Miller in regard to the value of the land.

This evidence was such as, if adopted in any degree as the measure of damages, tended to shew that a very high sum was likely to be awarded, higher probably than the Company had ever imagined, or could have thought credible; and it was evident that they were desirous in consequence to abandon the idea of occupying the piece of land in question, and content themselves with what they had already acquired from Mr. Miller.

They had, it seemed, as long ago as 1847, by an amicable agreement with Miller, acquired from him such land as they considered they would then require, being, so far as could be seen from the plans, four or five times as much in quantity as the piece in question.

They were to give him for this six shares of railway stock, and the Company at that time covenanted that they would not interfere with or obstruct Miller in his claim or right to the water front lying north and east of the starting point of the land which they were then acquiring from him. What was the object of that stipulation, and what its extent, was not explained; that is, whether it was meant to apply merely to the unobstructed use of the small fragments of land which Miller still owned, and which, as it fronted upon the bay, and was bounded by it, might properly be called the water front, or whether it was meant to apply to land covered with water which Miller did not own.

After Miller had made them over the right to that tract, he retained only the small piece of land, said to contain not more than $\frac{3}{8}$ or $\frac{1}{2}$ of an acre, which, in February, 1854, the Company were desirous of acquiring. The piece they had already bought was bounded to the north by a straight line 452 feet long, and whatever land it left in Miller's possession was bounded on the east by the limit between lot 16, in Barton (Miller's lot), and the adjoining lot 15, and to the west by a large water lot which the Railway Company had acquired, and on which they had built or were building their wharf at the Hamilton terminus.

Between this straight line of 452 feet and the waters of

Burlington Bay the half acre or less of dry land which remained to Miller, was composed of little pieces projecting more or less towards the water, according to the indentations of the shore. The water towards the eastern limit of lot 16 was marshy along the line of front; towards the western end of the 452 feet, it was less so. There was said to be but little depth of water for some distance out from the shore, but the affidavits were not precise on that point.

Freeman shewed cause, citing Tracey v. Hodgest, 7 U. C. R. 5; Slack v. McEathron, 3 U. C. R. 184; Scobell v. Gilmour, 5 U. C. R. 48.

Becher, contra, cited Baby v. Great Western R. W. Co., 12 U. C. R. 106; Russ. on Arb. 629-635.

ROBINSON, C. J .- It is evident from the written agreement entered into in 1847 that Miller had then present to his mind an idea that this margin along the bay, which the Company did not then care about acquiring, might, on account of its situation on the water, become of value, for he stipulated with them that they would not interfere with or obstruct him in his claim or right to the water front.

Since they had come under that stipulation, it is to be regretted that they lightly departed from it, for by doing so they have brought much trouble upon themselves, which it is quite evident they could have avoided, and have excited expectations in Miller which it may be easily supposed they could have had no idea of.

The explanation which they give is intelligible enough. We know that the railway was not begun to be constructed for some years after they got their first tract from Mr. Miller, and it can be easily imagined that as a great work of this kind developed itself, many reasons may have presented themselves for alterations and deviations, and additions, that the early projectors of such an undertaking did not sufficiently consider. They allege now that all that they really wanted and considered of much importance to them was a little more width at the western corner of the piece which they had already acquired from Miller, so as to enable them and the public to pass along that street of the town which runs

through this first acquired tract, and get upon their wharf, and in front of their station, without crossing or going too near to the railway track, which is in constant use. An inspection of the plan shews that more room just at that point must be necessary, though to gain that advantage it is not indispensable that the Company should interfere to any considerable extent with the water front to the east of it, on which the arbitrators have set so great a value.

It can be readily believed that till the stations were fixed upon and buildings erected, and till the track or tracks were laid down, it may not have seemed necessary to have made more room than the Company had secured in 1847.

As soon as it became evident from the testimony given by the witnesses called before the arbitrators on the 26th of June, 1854, that Mr. Miller was claiming not merely the value of the land which he owned, but for a supposed right or privilege which he did not own-namely, a right to land covered with water, and reaching to an indefinite extent into the waters of Burlington Bay; and that on account of this supposed or expected right or privilege, which he had not yet acquired, and possibly never might have acquired, such a price as £70 a foot was spoken of as a sum not too much to be paid for the whole water frontage—that is, for whatever Miller owned north of the piece which the company had first bought; or at least as soon as Mr. Miller's claim seemed at all likely to be looked upon in that light by the arbitrators, the Company, it appears, have desired to relinquish altogether what they had taken possession of, and what formed the subject of the submission. They do not seem to have proposed to limit their occupation to a portion only, but they state themselves to be willing to surrender their hold of any part of it, and to gain the additional room they want by such alterations as they can make upon their own premises adjoining Mr. Miller.

They moved the court, in consequence, to be allowed to revoke their submission (a), and failing in that, they seem to have gone on reluctantly, and with a very bad grace, with the arbitration, treating it as compulsory, and intending, as they have declared, to do all that was in their power to avoid being bound by the award.

⁽a) See Great Western R. W. Co. v. Miller, 12 U. C. R. 654.

The claimant however has persevered, and certainly there is some appearance of inconsistency on his part in the efforts which he makes to hold the Company to the award; for if he was sincere in believing that what the Company wished to acquire from him was worth, as he expressed it, £30,000, or has confidence in the evidence of his witnesses, who valued it before the arbitrators at £70 a foot, he ought not to be very anxious to hold the Company to an award which gives him little more than £11,000 for the same property.

Yet he does claim to have the benefit of his award, and it is thrown upon us, therefore, to determine whether he can hold it against the objections that have been urged.

The first objection is, that the arbitrators wrongfully and unfairly refused to express in their award the quantity, description, and extent of land, and the rights and privileges awarded upon, or the estate or interest of Miller therein. certainly is most essential, when a sum like this is awarded, that the Company should be under no uncertainty as to what they are to get for it. If the award does sufficiently state what Miller is to make over to the company, or to assure to them, then there can have been no misconduct in the arbitrators in refusing to express it. If the award does not make that plain and certain, I apprehend it would be a fatal defect on the face of the award, without reference to any question of fairness or unfairness in the arbitrators in making the omission. Now the deed of submission, recited fully and truly in the award, states that the Company had set out and taken for the uses of the road a portion of Miller's land, being all his land lying immediately north of the land theretofore conveyed by him to the Company, together with the rights, privileges, advantages, and appurtenances, thereto belonging;" and the award determines "that the value of the land, rights, privileges, advantages, and appurtenances, so set out and taken as aforesaid, is the just and full sum of £11,300." So far as regards all the land owned by Miller lying immediately north of the land which he had before conveyed to the Company, I think there is no want of necessary certainty. No reasonable construction could extend these words to any land north of Burlington Bay, and wholly

unconnected with the land before conveyed to the Company; and as the Company are parties to the submission in which the same description is used, and admit by the recital in that deed that they had already taken the property thus described for the use of the railway, they must be supposed to know what they had taken, and what that description means—though I confess I have some difficulty in looking upon a description as sufficient, which names no locality, and which would apply equally to any county in Canada in which Miller had made a previous grant of land to the Company.

But as to anything beyond what Miller then actually owned, together with the rights, privileges, advantages, and appurtenances thereto belonging, I am not of opinion that the award conveys any information, or gives the Company to understand that the £11,300 to be paid will entitle them, even as against Miller himself, to hold or claim anything. This brings up the right spoken of in the argument, to look for the courtesy or consideration of the government, and to except that in the exercise of such courtesy or consideration the government will not grant to any one but them the land covered with water which is in front of Miller's property; and that the government, if they acquire Miller's property, will certainly grant it to them. It is admitted that Miller's present property extends only to the edge of the water, and that he has beyond that no legal or equitable estate whatever. If he has not, then he has nothing of this kind which the law can intend to pass, or to have been estimated for under the words-"together with the rights, privileges, advantages, and appurtenances, thereto belonging."

If it was intended, as seems to be conceded, and to be clear upon the papers before us, that besides all that Miller legally owned north of his former grant, the company shall, when they pay the £11,300, be considered as acquiring from him whatever claim he had to the consideration of the government for a grant of land covered with water in front of the 432 feet; and if any considerable portion of the money was given for the surrender of such supposed claim, then certainly that intention, to say the least, ought to have been plain on the face of the award.

'As the matter now stands, Mr. Miller might, if he were so disposed, contend that the Company are precluded by their covenant entered into in 1847 from interfering with his claim or right to the water front, whatever that stipulation may mean, while the company could not, that I see, call upon a court of justice to determine that under the award they should be considered as having paid for anything in which Miller had not at the time of the award some estate or interest that a court of law or equity could recognize.

We have no knowledge that the Company, if they should comply with this award in the terms in which it is framed, would gain a right to anything that could not be held to be a legal or equitable interest vested in Miller.

I think, therefore, that upon the ground that the award gives no intimation of anything having been allowed for, which would not come under the description of a present legal or equitable interest in Miller; and that it has been shewn to us that a large part, if not by much the larger part, of the sum awarded has been allowed for something which did not and does not constitute any estate or interest, legal or equitable, owned by Miller; the award should be set aside, if there were no other objection.

But, in my view of the case, we are even more strongly called upon to set aside this award on account of the second and third objections; for I think it was both unreasonable and illegal, and repugnant to the letter and spirit of the statutes, that the arbitrators in valuing half an acre of land should add to that value immensely by taking into account a supposed claim to the favourable consideration of the government for something more than the claimant then owned or had any pretension to either in law or equity, and something moreover which no court can hold to be included within the terms of the submission, for it is nothing in the eye of the law appurtenant to Miller's estate, nor can any damages allowed on account of it be considered as coming within any idea of the legal damage which Miller can sustain by reason of his land being taken from him. The land covered by the waters of Burlington Bay is admitted to be still in the Crown, which may or may not choose to make a grant of it to any one;

and the awarding to Miller such a sum as £11,300 as a compensation for about half an acre of land, under the idea that the possession of that land will put the Company in a situation to address an application to the government for what the government may or may not in its discretion grant to them or to any one, seems to me to be so utterly irreconcilable with what we must take to be the intention of the statute under which this award is made, that we cannot uphold an award made upon such a principle of computation.

I need not say what it would have been thought by me incumbent on us to do, if the award had been excepted to simply on the ground that the sum awarded is so outrageously extravagant as to shew conclusively that the arbitrators must have failed to regard that provision in the statute 9 Vic. ch. 81, sec. 26, which enacts "that in all arbitrations under that or any other act relating to the said railroad the arbitrators shall take into consideration the benefit conferred on the property, as well as the damage done to any particular portion thereof;" and I purposely refrain from expressing any opinion as to the right of the Company, after any award has been made, to relinquish possession of the land which has been valued, and to claim exemption in consequence from a compliance with the award (a).

This is a very important question, but it does not present itself for decision upon this application. I will remark, however, that when we consider that the claimant began by claiming £30,000 for this small property, and produced witnesses to prove it worth £70 a foot, which is scarcely a lower estimate, it does seem to shew a want of confidence in such opinions and estimates that he should be unwilling to assent to what the Company desire—namely, that they should be allowed to do without it rather than pay about one-third of what it has been thus valued at.

McLean, J.—It is quite clear to me that this award must be set aside on the grounds urged, for it is admitted that the arbitrators not only allowed what many would consider fabulous prices for the land intended to be taken by the Company, but they have allowed for land covered with water in front

⁽a) See Baby v. The Great Western R. W. Co., ante page 291.

of it on Burlington Bay, in which at the time Miller had no estate or interest whatever, and which, according to the statement of his counsel, he had only a claim upon the government to grant to him.

I cannot help considering as misconduct on the part of the arbitrators, if it does not amount to fraud on the Railway Company, that they should have felt at liberty to add to the value of the small piece of ground which actually belonged to Miller, and which alone he could convey, by taking into consideration the value of the ground covered with water in front of it, which belonged to the Crown. This alone affords ample ground to entitle the Company to have the award set aside.

Burns, J .- I do not consider this award bad for want of defining the land which would be transferred to the Company. The submission expresses that the Company had set out and taken for the uses of the railway a portion of the lands of Miller, being all his land lying immediately north of the land before conveyed by him to the Company. Although it is quite true no place is mentioned where this land is, yet it is apparent that both parties knew its locality, and I do not see that any award need do more than make the matters certain to the parties themselves. They are the parties requiring the information, and if it appears certain enough as between themselves, that is all that is required, as it appears to me. The Company knew very well what land had been set out, and the award is certain so far that it refers to that land and no other.

I think the award bad, however, on the ground that having awarded, as it appears the arbitrators have done, for something which Miller had no title to, and could not give to the Company, it is an excess of authority in the arbitrators, and the award is defective in not being mutual. The expressions in the submission are, that the arbitrators had power to award respecting the land, and the rights, privileges, advantages, and appurtenances thereto belonging; and the award recites the same expressions, and awards the large sum of £11,300 in respect of the whole. The arbitrators tell us

that they did take into consideration the claim of said Miller to the water front in respect of the land, to the extent that such claims are usually recognized and conceded by the government to the owner of land bordering on the waters of bays and harbours; though in doing so they say they considered the rights of others; yet they say they valued the land taken by the Company with the water frontage, upon the supposition that the government in granting the water would allot the same fairly between the owners of the shore. is clearly a false principle upon which the arbitrators have acted; and they have assumed that to exist which the courts have always declared did not exist. The proprietor of the land extending to the shore has no more right or authority over the waters beyond the shore, or the land beneath the waters, than all other of Her Majesty's subjects have; he has no right to expect the crown will grant or dispose of any peculiar advantage to him in preference to any other person. The terms of the submission cannot be interpreted to mean anything different from the law of the land, and that is, and has always been taken to be, as I have said. When the arbitrators undertook to deal with the right in the water and the soil beneath, they did that which the submission did not authorize, for such right never existed in Miller. The award cannot in this respect be mutual, for the Company is made to pay for that which Miller can give neither a legal nor equitable title to. If any such equitable title did exist to the exclusive privilege of enjoying the use of the water frontage, as it is called, out to deep water, it is not in any way transferred to the Company. Miller is not directed to convey any such privilege, if he had it, upon which the Company could present a claim to the government. If the right of all to use the water exists, as I take it that it does, I see no exclusive right given to the Company, because they by the award are made to pay a large sum for it. The government may never recognize any right in the Company to use the water exclusively. The award compels the Company to pay for that which Miller has no right to, and may never procure, and if it can be procured, may be procured by him even now, after the award in his favour as well as before it was made.

It appears to me, for these reasons, that the arbitrators exceded their powers, and the award is wanting in mutuality in attempting to give the Company for the large sum which they would have to pay that which Miller had neither a legal nor equitable title to.

Rule absolute.

ALTON V. THE HAMILTON AND TORONTO RAILWAY COMPANY.

Case against R. W. Co-Sufficiency of declaration-Pleading.

Case—The declaration stated that the plaintiff was seized of certain lands adjoining defendants' railway, which land ought of right to be drained by ditches through defendants lands; that defendants were using these lands for their road; yet that they negligently, unskilfully, wrongfully, and injuriously, placed earth, &c., in, upon, and across the said drains so passing through their lands, and thereby obstructed the same, whereby plaintiff's land became wet and useless, &c.

Held, that a sufficient cause of action was shewn, and that the plaintiff,

having obtained a verdict, was entitled to retain it.

The plaintiff declared in an action on the case. The first count stated that he was seized in fee of certain land in Nelson, adjacent to the railway of the defendants, which land of the plaintiff ought of right to be drained by means of ditches upon and through the adjacent land of the defend. ants; that the defendants were using and occupying these lands for the purposes for which they were incorporated under statute 16 Vic. ch. 99, sec. 10, and were bound by law to erect fences on the line of their railway; yet that the defendants, on the 22nd October, 1854, and on divers days, &c., negligently, unskilfully, wrongfully, and injuriously, placed earth, stone, and wood, in, upon, and across those portions of the said drains which then of right passed through the land of the defendants, and kept and continued the same from thence hitherto, and thereby obstructed the drains, and rendered them useless; whereby the plaintiff's land became wet and useless, and the plaintiff was hindered from cultivating the same-laying special damage.

Second count-That the defendants, on the 22nd of October, &c., and from thence hitherto, neglected and refused to erect and maintain sufficient fences upon the line of their railway, by reason whereof the plaintiff's cattle, then lawfully depasturing upon his lands, escaped therefrom, and

were for a long time lost to the plaintiff (laying special damage for expense in recovering them, &c.), and another cattle of the defendants and other persons strayed from the said lands of the defendants upon the plaintiff's lands, and consumed and spoiled the grass of the plaintiff there growing—laying special damage; to plaintiff's damage of £100.

Pleas-1. Not guilty, "by statute."

- 2. That the plaintiff was not possessed of the lands, &c., as in the declaration mentioned.
- 3. Traversing the right of the plaintiff to have the drains and watercourses through the defendants' land, &c.

At the trial, at Milton, before Richards, J., the evidence shewed that there was a small field of the plaintiff through which the railway runs, which before the construction of the railway was wet in parts, but was drained by a ditch which assisted the natural flow of the water through the lowest part, till it left the plaintiff's land; that the defendants, by constructing their railway, blocked up this ditch, and made the usual ditches along the sides of their railway, the consequences of which were, that the water which used to flow along the old ditch was dammed back, and the water settling in the side drains in large quantities overflowed at times, and rendered parts of the small field unfit for cultivation. Before the trial a culvert had been made, which allowed the water to pass the track, and at the time of the trial the injury complained of did not continue.

It was objected for the defendants, that as they had authority by law to make the railway through the plaintiff's land, the declaration should have charged that the injury was caused by some breach of duty on their part in acting under their legal authority, as by constructing the railway negligently and unskilfully, or making the drains improperly and negligently.

On the other hand, the plaintiff's counsel contended that the declaration did put the action on the ground of unkilfulness and negligently in filling up the drain, which could easily have been avoided.

The learned judge ruled in the plaintiff's favour, reserving leave to the defendants to move, and submitted to the jury

whether the railway had been negligently and unskilfully made as complained of. The jury found for the plaintiff, and £25 damages, stating that for the injury occasioned by the obstruction while it lasted they gave £20 damages, and £5 for the other alleged injury; respecting which it was proved that during part of the summer and autumn of 1854, while the defendants were making their railway, they omitted to fence in their line; that in November, 1854, the fences being still wanting, a yoke of steers of the plaintiff's escaped in consequence from his land, and were missing till the 12th of January, when he recovered them after some trouble and expense.

Nanton, for the defendants, moved to reduce the verdict by the amount of damages recovered under the first count, on the ground that that count is not sustainable, because it admits the right of the defendants to construct their railway as mentioned, and does not charge that the injury complained of was caused by any unskilfulness or breach of duty in the defendants in constructing their railway.—He cited Burnett v. Lynch, 5 B. & C. 609; Northam v. Hurley, 1 E. & B. 665; Chy. Plg. II. 152; Com. Dig. "Pleader" 47, 49.

Martin shewed cause.

ROBINSON, C. J.—The only question before us upon this rule is, whether the plaintiff can be allowed to retain his verdict for £20, for the injuries stated in the first count. am of opinion that he can. The evidence shewed such an injury as the plaintiff complained of in the first count. His land, it appears, in that part of it which is in question, was drier and more fit for cultivation before the railway was made than afterwards, there being several acres which, unless drained by the natural flow of the water towards a lower part, would in general be unfit for use. The evidence seemed to prove that the railway was so constructed as to obstruct this escape of the water; and that this was unnecessary is put beyond question by the fact, that since this action was brought the defendants have prevented further damage of the kind by making a passage for the water through the embankment, a precaution which, for all that appears, might as easily have been taken before.

The statute 4 W. IV. ch. 29 gives very extensive powers to the original Company, with whose greater work this is incorporated by the statute 16 Vic. ch. 44, but it qualifies them by the words "they, the said company, doing as little damage as may be in the execution of the several powers to them hereby granted, " a restriction which would at any rate, I think, have been implied, and which is not affected by anything contained in the later statute, 16 Vic. ch. 99. On the contrary, it seems to have been within the contemplation of the Legislature that the Company might make themselves liable to actions by their manner of proceeding, notwithstanding the provision made for settling by arbitration all claims that could be so adjusted on account of any injury arising from a fair exercise of the powers given to the Company by law. By the 10th clause of 16 Vic. ch. 99, it is enacted, "That all suits for indemnity for any damage or injury sustained by any person or persons whomsoever, by reason of the said railway, shall be instituted within six calendar months next after the time of such supposed damage sustained," &c.

The cause of action which the Legislature must have had in view in this provision, I think, were such injuries as are complained of in this action—namely, the occasioning unnecessary injury by the neglect of proper precautions. Whether this was a case of that kind was left properly to the jury upon the evidence, and the testimony seems to support their verdict. Even if the case was not perfectly clear so as to exclude all doubt, we should find it difficult to set aside this verdict, on account of the moderate amount, where there is so much evidence in support of the plaintiff's case. But we are only asked to dispose of the strictly legal question, whether an action can be sustained upon the first count, taking the allegations to be proved, and I consider that it can.

The case of Lawrence v. The Great Northern R. W. Co. (16 Q. B. 643) fully supports this action; and that case was so much stronger than the present in favour of the defendants, and there the damages for what the company could properly do in the fair exercise of their power had been settled by arbitration. In this case there has been no award.

Burns, J.—We are asked to reduce the damages by the amount the jury have assembled upon the first count, on the ground that the court is not sustainable. As the count is framed I think it is sustainable. It alleges a right of the plaintiff to have his land drained across the land of the defendants by means of certain drains and watercourses, which drains and watercourses it is alleged the defendants have wrongfully stopped up and obstructed.

It is very true it is admitted that the defendants have done what they have under the act of Parliament incorporating the Company, but they have had no legal right to deprive the plaintiff of his right without compensating him for the injury. It does not appear whether the plaintiff is the owner of the land on both sides of the railway, or that the defendants have taken from him any land, so that the question of compensation by means of arbitration can be applied.

The 11th section of 4 W. IV. ch. 29, incorporated into this act, would seem at first sight more extended than it really is. It declares that the railway shall not interfere with or incroach on any fee simple, right, or easement, or privilege of any individual, without permission first had and obtained, either by the consent of the owner or by virtue of reference authorized by the act.

When this is taken in connection with the third section, then it appears to me all has reference to what may be required for the construction of the railway, and whatever of these matters may be required for the construction of the railway, then it is a matter for compensation by means of arbitration. If none of these things be required for the construction of the railway, then the parties are left to their common law rights, unless the Legislature, by legalizing the construction of the railway, have deprived or abridged individuals of their rights for the general benefit.

Now it does not appear, so far as disclosed by the declaration, that it was necessary for the construction of the railway that the defendants should have a right or the privilege of stopping up and obstructing the drains and watercourses which drained the plaintiff's land, and therefore does not present a question whether the plaintiffs should obtain compensation in the way pointed out by the act. What description of watercourses these in question are, does not appear by the declaration. The 9th sec. of 4 W. IV. ch. 29 makes it the duty of the defendants to restore watercourses to their former state, or in a sufficient manner not to impair their usefulness. The charge in the declaration is, that the defendants have choked up the watercourses and obstructed them. I have not examined the evidence to see whether that would sustain the declaration, for the objection made at Nisi Prius, and again renewed, is, that the count is deficient, and does not enable the plaintiff to maintain an action. I think the count is sufficient, and that upon the objection taken judgment should be for the plaintiff.

THE STREETSVILLE PLANK ROAD COMPANY V. THE HAMILTON AND TORONTO RAILWAY COMPANY.

Joint stock road company—Right of action against railway for injuring their road—arbitration

A road company, incorporated under the general acts, were held entitled to maintain an action against the Hamilton and Toronto Railway Company, for neglecting to make within a reasonable time, a proper bridge over their railway where it crossed the plaintiffs' road.

Special action on the case against the defendants, for carrying their railway across the plank road of the plaintiffs who are incorporated under the Joint Stock Road Acts, and for wrongfully neglecting to make within a reasonable time a proper bridge over their railway, with convenient approaches, as the law requires, whereby the public were obliged for a long space of time to abandon this plank road, which caused a great loss of tolls to the plaintiffs.

Plea, "Not guilty," by statute.

At the trial, at Toronto, before Robinson, C.J., it was objected that the action could not be maintained, because—1st., such an injury as is complained of would be a damage for which under the act damages must be sought by arbitration, if it can be recognized as a private damage; and, 2ndly., if not a private damage, and so not to be compensated by means of an action, their only remedy is by indictment as for a public nuisance.

The learned Chief Justice allowed the case to proceed,

subject to the exception, and on the evidence the plaintiff received a verdict for £45.

J Duggan moved for a new trial on the law and evidence, and for misdirection. He cited Rose v. Miles, 4 M. &. S. 101; Rex v. The Inhabitants of Taunton St. Mary, 3 M. & S. 472; Hall v. Smith, 2 Bing. 163; Regina v. Scott, 3 Q. B. 543; Regina v. Great Western R. W. Co., 12 U. C. R. 250; 4 W. IV. ch. 29; 10 & 11 Vic. ch. 95.

Galt, contra, cited Regina v. North Midland R. W. Co., 2 R. W. Cas. 1.

ROBINSON, C. J., delivered the judgment of the court.

The first objection taken is disposed of by the opinion which we have just given in the case of Alton against the same company which defends this action. (a) The statement of the injury in this case very clearly rests the cause of action on an alleged wrongful neglect of the defendants to do that which it was their duty to do. The plaintiffs are not complaining of any injury which they have suffered from the defendants having done that which the act of Parliament allowed them to do, and for which compensation is intended to be provided by means of an arbitration and award. The arbitration usually takes place before the work is proceeded with, and the damages awarded must be supposed to be founded on a computation of the injury that will be occasioned by the railway, assuming that the powers given by the act are exercised with due care, and with a just regard to the rights of property; in other words, that the Company will observe the restriction contained in the 5th clause of the statute 4 Wm. IV. ch. 29, that they shall do "as little damage as may be in the execution of the several powers to them granted."

The ninth clause of the act gave to the defendants, no doubt, the right to take this railway across the plank road of the plaintiffs; but with a proviso, that they must "restore the highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness."

If an arbitration had taken place before the road had been interfered with, any damages accorded would, as we must suppose, have been computed without allowing for any un-

reasonable delay in the Company to restore the road, for it would have been assumed that the Company would have complied with the statute in that respect. The injury for which compensation is sought in this action would therefore not have been covered by the award; and, as we remarked in the case of Alton against this Company, this case is so much the stronger in favour of the plaintiff than the case to which we referred, in 16 Q. B. 643, that in this case there has been no arbitration. It is, of course, to be considered, when an injury has been sustained by anything done by the Company, (whether such injury was occasioned from negligence and want of skill, or necessarily and unavoidably,) whether resort must not be had to an arbitration as the only remedy open to the party injured. We think that is not the effect of anything contained either in the original act of 4 W. IV. ch. 29, or in the subsequent act 16 Vic. ch. 99, and the provision in the tenth clause of the latter statute is consistent with this conclusion.

Whether the defendants in this case had within a reasonable time done what was incumbent on them for restoring the road which they had intersected, was a question for the jury, and it was left to them to determine. We think the verdict they gave cannot be said to be against the evidence, and that we cannot on that ground set it aside.

Then, as to the other ground, that what is complained of is a public nuisance, being the obstruction of a common highway, and that no one or more of the Queen's subjects can sue separately for his or their share of the damage; we do not think that principle applies to the present case. because these plaintiffs had a peculiar interest in the plank road, distinct from the common interest which they would have in it as persons entitled to use it for the purpose of travelling. They had made it by their labour and capital, and were in consequence entitled under an act of Parliament to receive toll upon it, which toll might be most materially interfered with by destroying or obstructing their road, and rendering it inconvenient to be passed at any particular point. The case cited for the plaintiffs of Rose v. Miles (4 M. & S. 101), applies strongly in principle in favour of this action.

Rule discharged.

GOLDIE V. TAYLOR.

Crown grant-Construction of-Estate.

The land in question was granted by letters patent to Annie Goldie, her heirs and assigns, for ever, "to have and to hold the said parcel or tract of land thereby given and granted to her the said Annie Goldie in trust for herself and her children, Martha Goldie and Francis Goldie."

Held, that Annie took the fee, and that no legal estate passed to the children.

Ejectment for the east half of lot one in the fifth concession of Metcalfe.

A verdict was taken for the plaintiff, and one shilling damages, subject to the opinion of the court upon the following facts:

On the 19th of September, 1835, the Crown granted, by letters patent under the great seal, the land now in question, to Annie Goldie, widow of the late Francis Goldie, deceased, formerly a sergant in the 91st regiment of foot, her heirs and assigns, for ever, to have and to hold the said parcel or tract of land thereby given and granted to her the said Annie Goldie, "in trust for herself and her children, Martha Goldie and Francis Goldie." No further or other expression relative to the trust was contained in the patent.

On the 13th of December, 1854, Martha Goldie, then wife of Isaac Hamblin, made a deed jointly with her husband, conveying this land in fee to Francis Goldie, the plaintiff,

which was registered on the 11th of April, 1855.

Annie Goldie, the grantee of the Crown, had died seven years before this deed was made; but she had in her lifetime conveyed the land in fee to one Lyons, who conveyed to the defendant.

The question was, whether any legal estate passed to Martha Goldie under the patent, or whether the grantee Annie Goldie was alone seized of the legal estate.

Becher, for the plaintiff. Boomer, contra.

The authorities cited are referred to in the judgment.

ROBINSON, C. J.—I think the legal estate vested wholly in Annie Goldie, that the intent was to give her the legal estate in trust for the maintenance of herself and children: that it is a trust rather than a use that is declared; and that if any remedy is to be sought for enforcing the trust, it must be in equity.

The postea, I think, should go for the defendants claiming

the legal estate under the conveyance of the grantee of the Crown.

BURNS, J .- The words of the habendum in the patent now before us differ from that of Doe Snyder v. Masters (8 U. C. R. 55.)—In that case, though the grant was to John Snyder, his heirs and assigns for ever, yet the patent declares it was in trust for his son Isaac Snyder, a lunatic, his heirs and assigns for ever. In the present patent the words are, " to have and to hold the said parcel or tract of land hereby given and granted to her the said Annie Goldie (in trust for her and her two children, Martha Goldie and Francis Goldie) her heirs and assigns for ever." As bearing upon the question in whom the fee was vested, the habendum is followed by this proviso, "provided that Annie Goldie, her heirs and assigns, shall and do within three years, erect and build, or cause to be built, a good dwelling house, &c. The first question is, whether this plaintiff can take any legal estate in the premises by reason of being named in the patent. The plaintiff's name appears in no part of the patent except in the words within the parentheses. According to Samme's case (13 Co. 56,) inasmuch as the name does not appear in the premises in the patent, no estate would pass by reason of being named in the habendum; and the only question is, whether a use is created. I cannot see that it is. expression in the Statute of Uses is, "where any person stands seized to the use of any other person." Some kind of trust in favour of the two children no doubt was intended, but it is difficult to define it. The trust in the first place is expressed to be for herself as well as the two children, and the fee simple is given to her and her heirs and assigns. No limitation is expressed to the heirs of the children. It might be that Annie Goldie would outlive them, and in such case, I do not see there is any room for saying a springing use could arise. It is apparent to me the whole use must be executed in Annie Goldie, in which case she is in by the common law. and not by force of the statute, and does not stand seized to the use of any other person; and though it be that some benefit was intended in favour of the two children, and possibly a trust might be carried into effect in their favour in respect of the purchase money of the property or otherwise, yet there can be no use in favour of the children limited upon a use executed in the grantee.

McLean, J., concurred.

Judgment for defendant.

VIZARD V. GILCHRIST.

Promissory note declared on as a bill of exchange-Amendment-Special finding.

Plaintiff declared against the defendant as maker of a note, and the instrument produced at the trial was a bill of exchange drawn by defendant, and endorsed to the plaintiff; an amendment was applied for, and aspecial finding directed, on which the plaintiff applied to enter judgment in his favour.

The application was refused, as such an amendment could not properly have been allowed under the statute.

The plaintiff declared in assumpsit on a promissory note, made by the defendant, on the 17th of April, 1855, to Robert Steele, or order, for £100, payable three days after sight, and endorsed by Steele to the plaintiff. The defendant pleaded; 1st, Non-fecit; 2nd, That Steele did not endorse; 3rd, That the period for the payment of the said promissory note had not elapsed before the commencement of this suit, 4th, Set off.

The case was tried at Peterborough in October last, before Draper, J. The plaintiff produced an instrument in the words following:—"£100. Peterborough, 17th April, 1855. Three days after sight pay to Robert Steele or order the sum of one hundred pounds, H. C., value received. John Gilchrist, Jr., William Cluxton, Esq., Agent Commercial Bank, Peterborough;" endorsed "R. Steele;" with a protest under the hand and seal of a notary public, that on the 23rd of May, 1855, at the plaintiff's request, he presented the bill, to Cluxton, the drawee, and demanded acceptance, which Cluxton refused, whereupon he sent notice by post, duly addressed to the defendant and to the endorser; and with a similar protest, and notice to the same parties, stating refusal by the drawer to pay on the 29th of May, 1855.

The defendant's counsel admitted the signature of the defendant and of the endorser, but denied that this was a

promissory note, and moved for a nonsuit, contending that the instrument was, and should have been declared upon as a bill of exchange; and rested his defence there. The plaintiff applied for leave to amend, and the learned judge asked the jury to find whether defendant drew the bill and Steele endorsed it; whether it was presented for acceptance and payment, and whether both were refused; and they found all these matters affirmatively, and that the plaintiff was entitled on the bill to recover £103 15s. 0d., which finding was endorsed on the record.

In Michaelmas term, Wilson, Q. C., obtained a rule Nisi to enter the judgment for the plaintiff, according to the very right and justice of the case, upon the special finding of the jury according to the statute. He contended that this might be treated as a note, and that on the authority of the following cases the rule should be made absolute: Guest v. Elwes, 5 A. & E. 118; Gurford v. Bayley, 3 M. & G. 781; Cook v. Stratford, 13 M. & W. 379; Count v. Thompson, 7 C. B. 400; Harvey v. Johnston, 6 C. B. 295.

Eccles shewed cause.

ROBINSON, C. J.—I am not of opinion that the case of Guest v. Elwes, far as it goes, would warrant our acceding to this application. The defendant, as drawer of the bill, does not stand at all in the same situation as the maker of a promissory note. The principles on which they are respectively liable are distinct in the two cases. The maker of a note incurs an immediate liability by signing the paper: his promise is direct, not contingent upon any other person failing to accept or to pay. In actions against drawers questions may, according to circumstances, arise, which cannot in actions against the maker of a promissory note; such as, whether there have been laches in the holder, either in making presentment or in giving notice.

In Guest v. Elwes the plaintiff had sued for escape, and it turned out that the defendant in the process had not been arrested, though he might have been, and that the action consequently ought to have been for negligence in not arresting. In such a case a plaintiff may easily be taken by surprise by the evidence; his witness may have seen the sheriff's officer and the debtor standing near each other, and under such circumstances that to all appearance the debtor would be supposed to be in custody, and if he were afterwards seen at large, the natural inference would be that he had escaped.

Upon the trial a nice question might be raised as to whether what had taken place constituted an arrest or not, and the court would feel strongly inclined to say that the plaintiff could not well know whether the debtor had been actually arrested or not; that the officer must know what had occurred; and whether he had arrested and let him walk away, or whether, although he might have arrested him, he let him walk away without doing it, is in substance the same thing, so far as his misconduct or the damage to the plaintiff is concerned.

But here the plaintiff, being the holder of a bill drawn in favour of another party, who had endorsed it to him, knew exactly in what relation the defendant stood to him, and ought to have known that this situation was not even analogous to that of the maker of a note. He might as well have sued him as the maker of a bond. The Legislature could never have intended such a use to be made of the act. It would create great confusion, or at least encourage a most loose and heedless method of proceeding.

If the bill had been accepted, and the plaintiff had been suing the acceptor, he might at least have urged in favour of the desired amendment that he was proceeding against a person whose liability was the same in principle as that of the maker of a promissory note, but he cannot say this of the drawer; and if we should grant this rule, I do not see why a plaintiff suing an executor, when his executorship was denied, might not ask to have his action turned into an action by him as administrator; or why a plaintiff suing for the seduction of his wife, might not ask to have his declaration changed into a complaint for seducing his daughter.

The statute was intended to remedy cases in which a plaintiff was surprised at the trial, by evidence showing a case different in some immaterial circumstance from what he had been led to suppose it was, which might often happen from a cross-examination eliciting facts from a witness which he had suppressed or forgotten. It is intended also to remedy cases where a party had by a slip which will sometimes happen where great pains have been taken, misstated some contract or matter necessary to be proved as laid.

But here the plaintiff must have known well that he was not suing on a promissory note or anything like it, while proceeding against the drawer, and he must have deviated intentionally from his instructions, and deliberately misstated the cause of action which he held in his hand, or he must have declared upon a written instrument without taking the trouble to look at it.

In Guest v. Elwes Mr. Justice Patteson beserves, that he did not understand this particular section of the act, on which this course is taken of having the facts found specially to be intended for cases where the judge thinks there ought not to be an amendment, but only where he thought it doubtful whether an amendment should be made or not. For my own part I must say that I would not have allowed an amendment in this case at the trial, and do not think we should be exercising our discretion soundly and beneficially in allowing the plaintiff to enter judgment, as if he had been suing the defendant as drawer of a bill.

DRAPER, J.—In order to enable the court to act upon the finding of the jury, endorsed on the record in pursuance of sec. 16 of the statute of Upper Canada 7 William IV. ch. 3, the variance must be in their judgment immaterial to the merits, and the mis-statement such as could not have prejudiced the opposite party in the conduct of his defence. It must, in fact, be such a case that the judge at Nisi Prius could have directed an amendment to be made, but where, as Patteson, J., says in Guest v. Elwes, "he thinks it doubtful whether an amendment should be made or not." It is in effect submitting the question of amendment to the court instead of deciding it himself; with this difference, that the court, instead of amending the pleadings, have power upon the facts found to give judgment according to the very right and justice of the case.

We are to look at the record and the finding of the jury only, (10 C. B. 582) in order to determine whether this rule should be made absolute. The record shews a declaration on a promissory note, dated 17th April, 1855, for £100, payable to R. S. or order, three days after sight, and endorsed by R. S. to the plaintiff. The pleas are a denial of the making and of the endorsement, and an assertion that the period for the payment of the promissory note had not elapsed before the commencement of the suit, meaning to raise the question, whether three days after sight had elapsed; in other words, whether the note had been presented to defendant for payment, and three days had after such sight of it elapsed before the suit was brought.

According to the finding, the instrument was a bill of exchange, dated 17th of April, 1855, drawn by defendant for £100, payable three days after sight, upon William Cluxton, in favour of Robert Steele, who endorsed it to the plaintiff. This bill was duly presented for acceptance, was protested for non-acceptance, and immediate notice thereof given to defendant, and was also presented for payment, protested for non-payment, and notice thereof also properly given to defendant.

If the bill had been declared on, every fact, the onus of proving which could (unless under some special circumstances) have been thrown upon the plaintiff, was proved. It was neither pretended at the trial, nor has it been suggested since, that the defendant has any answer to a count on the bill, and if I could have properly made the amendment at the trial, then the judgment ought to be now given for the plaintiff.

After the best consideration I can give the matter, I am of opinion, (though with some hesitation) that I could not have properly made the amendment. The nearest case I have found to this is, David v. Preece (5 Q. B. 440), which was an action on a promissory note, and the defendant pleaded that the holder accepted another note, with an additional party, in satisfaction of the one sued upon. It appeared in evidence that this other note had been given and accepted in satisfaction, not of the note declared on, but of

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an intermediate note which had been given, without the additional party, in satisfaction of the note declared on. This was held a variance; and though Maule, J., had at the trial allowed the plea to be amended according to the facts proved, the court made absolute a rule to set aside the verdict rendered for the defendant and to enter a verdict for the plaintiff on them, or for judgment to be entered for the plaintiff non obslante veredicto on those pleas: it does not appear which. And besides strong expressions from Lord Denman and Patterson, J., Coleridge, J., says-"You are striving, not merely to alter the description of the note in the plea, but to introduce new matter. It may be that the ultimate practical effect of the whole transaction would be the same, but the transaction which did take place is quite a different one from that described in the plea." In Cooke v. Stratford (13 M. & W. 387), Rolfe, B., remarks that the only guide the judge at Nisi Prius can have as to making the amendment, is, whether the amendment is or is not to correct a misstatement, not material to the interests of the case, and by which the opposite party cannot have been prejudiced." And he suggests as a test-"Supposing the party comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended?" I refer also to Addington v. Magan (10 C. B. 576); Buckland v. Johnson (15 C. B. 145); Wilkin v. Reed (15 C. B. 192); Knight v. M'Dougall (12 A. & E. 438); and see Doe Wilton v. Beck (22 L. J. C. P. 6).

But if the amendment should not have been granted, then the plaintiff is not entitled to judgment on the special finding. The reason that forbids the one must preclude the other. It appears to me to be the true view of the case, that it cannot be said that the promissory note declared on, though with some variance between the statement of it and the proof, has been found by the jury, but a new and totally different matter; and though, if the bill of exchange had been declared on with an amendable variance, the recovery would have been for the same sum, principal and interest, as was claimed on the promissory note declared on, yet that is the intro-

duction of a new cause of action, and not the amendment of a cause of action incorrectly stated on the record. I think therefore the rule must be discharged.

Burns, J., concurred.

Rule discharged.

TAGGART V. Ross.

[Ejectment—Evidence—Production of writing.

Ejectment—One of the plaintiff's witnesses proved that defendant took possession of the land under a verbal agreement with the plaintiff, to purchase it from him; and on cross-examination, the same witness swore that several days afterwards he heard the plaintiff say that there was some writing between him and defendant.

Held, not sufficient evidence of the existence of a written agreement to

render its production by the plaintiff necessary.

EJECTMENT for the north half of lot 25, in the fifth concession of Nepean, Rideau front.

At the trial at Ottawa, before *Macaultry*, C. J., the plaintiff shewed no title, but proved that he had been for some years living on the lot, cultivating and using it as his own, till about the 20th of June, 1854, when the defendant, Mrs. Ross, agreed with the plaintiff verbally, in the presence of several witnesses, that she would buy the land from him, and would pay him £25 at once, and £25 a-year for the three following years.

Upon this agreement the plaintiff gave up possession to her. It was proved by the same witness that about ten days afterwards he heard the plaintiff say that there was some writing between him and the defendant, and that defendant was to pay him £25 a-year; and afterwards the plaintiff complained that the defendant would neither pay him his money nor give him up his land, and that he was unable in consequence to make a payment that he still owed on the land to the person from whom he had bought it.

On the 25th of September following, the plaintiff demanded possession of this land—saying to the defendant, "If you are not going to pay me, are you going to give me back possession?" She answered that he had done all he could do, and might now do his best.

It was objected by the defendant—1st. That there was no sufficient demand of possession. 2ndly. That the plaintiff having shewn by his witness that there was a written agreement between him and the defendant, he could not recover without producing it.

The learned Chief Justice hesitated upon the second objection, but decided in favour of the plaintiff, and a verdict

was found accordingly.

Paterson obtained a rule Nisi for a new trial, on the law and evidence, and for misdirection; to which J. D. Armour shewed cause, citing Rex v. The Inhabitants of Holy Trinity, 7 B. & C. 611; Mott v. Delane, 2 Jur. 592; Strother v. Barr, 5 Bing. 158; Twyman v. Knowles, 13 C. B. 222; Watson v. King, 3 C. B. 608.

Burns supported the rule, and cited Doe dem. Wood v. Morris, 12 East 237; Whitfield v. Brand, 16 M. & W. 282; Keys v. Harwood, 2 C. B. 905; Fielder v. Ray, 6 Bing. 332; Rex v. The Inhabitants of Padstow, 4 B. & Ad. 208; Fenn dem. Thomas v. Griffith, 6 Bing. 533; Curtis v. Greated, 1 A. & E. 167; Brewer v. Palmer, 3 Esp. 213; Doe dem. Jeffrey v. Williams, 6 U. C. R. 160; Tay. Ev. 343, 376; Arch. N. P. 397.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule should be discharged. The title of the plaintiff to the land stands admitted by the conduct and declarations of the defendant; and the only question is, whether the defendant has, nothwithstanding, a right to the possession. If she has by reason of any writing which she holds, it is for her to produce it, or if it were in the possession of the plaintiff, to give notice requiring the production of it by him. We may reasonably assume that if there was a writing it contained nothing that would shew the defendant had a right to remain in possession, though unable or willing to make her payments. If there had been any writing that would have that effect, we should surely have heard of it upon this application. The defendant rests merely upon what one of the plaintiff's witnesses swore in cross-examination—namely, that there was some writing

between them; but before a party should be nonsuited for not producing a writing, there should be clear proof that there was a writing executed between the parties, for if we should take that upon a loose casual conversation between the plaintiff and a stranger, without any evidence that there was a writing executed which some one had seen, and which related to the terms on which the defendant was let into possession, we might be nonsuiting a party for not producing what never existed.

It was not the plaintiff here that wanted to prove the contents of the agreement, but the defendant, and she should have produced it, or given notice to produce it, if she could defend herself under it.

Rule discharged.

COOL V. MULLIGAN ET AL.

Trover—Possession necessary to maintain.

A bailiff seized certain goods upon an attachment issued by a magistrate under 13 & 14 Vic. ch. 53, sec. 64, and removed them to the premises of N.: he afterwards made a return of what he had done to C., the ordinary bailiff of the division court, and signed a paper relinquishing the possession of the goods, and transferring it to C. The goods having been taken from N.—

Held, that C. had not had such possession as would entitle him to maintain

trover for them.

TROVER for a quantity of household goods. Pleas—1. Not guilty. 2. Not possessed.

At the trial at Toronto, before Robinson, C. J., it appeared that one Nesbit, a bailiff, seized the goods in question on the 12th of April, 1855, under an attachment issued by a magistrate under the statute 13 & 14 Vic. ch. 53, sec. 64, against the goods of Hockstrafer, an absconding debtor; and the next day he removed them to the premises of one Nunn, and locked them up in an out-house of Nunn's, and left them there. He afterwards made a return of what he had done on the writ to the plaintiff Cool, who was the ordinary bailiff of the division court; and he signed a paper by which he relinquished the possession of the goods, and transferred it, as the paper stated, to the plaintiff. He also

gave to the plaintiff an order upon Nunn, requesting him to deliver the goods to the plaintiff, which goods were then still in Nunn's possession, who lived ten miles distant from where the order was given. Cool received the order, but before he made his appearance there to get the goods, and before Nunn had consented to hold the goods for him, one Corner came with a landlord's warrant against Nunn, made by Mulligan; and at the instance of Duncan and Figg, the other two defendants, he distrained the goods for rent due by Nunn, and afterwards sold them.

Two days afterwards, the plaintiff Cool, the bailiff of the division court, came and claimed the goods as if they had been seized by him under the attachment—in other words, he claimed to be clothed with the same special property in the goods as if he had seized them under the attachment instead of Nesbit.

It seemed that Fletcher, who sued out the attachment against Hochstrafer's goods, did not follow up the proceeding.

On the 31st of March, 1855, a warrant of execution issued from the division court against the goods of Hochstrafer, at the suit of one Thompson, returnable on the 30th of April, 1855, which was delivered to the plaintiff to be executed, but he never made any seizure under it. He claimed, however, to have had the goods in his custody under the attachment and under this writ, and upon that ground brought this action against the persons who took away the goods before he had in fact seen them.

It appeared to the learned Chief Justice that the goods had never been in the possession of the plaintiff under either writ, so as to entitle him to sue in trover for them, and on his intimating this the plaintiff took a nonsuit, with leave to move against it.

Eccles obtained a rule Nisi to set aside the nonsuit.

Hagarty, Q. C., shewed cause, and cited Davis v. Browne, 9 U. C. R. 193.

ROBINSON, C. J., delivered the judgment of the court. We are of opinion that the evidence did not shew a right in the plaintiff Cool to bring this action of trover. He never had had actual possession of the goods, not being the officer who seized them under the attachment, or the officer who had been authorized to seize them, and not having taken them into his possession under any authority.

It might have been a safe and proper provision for the legislature to have made in the statute 13 & 14 Vic. ch. 53, sec. 64, that as soon as the constable to whom a warrant should be directed under that statute had attached any goods, they should be deemed to be in the possession of the division court bailiff, or of the clerk of the division court, so as to entitle such officer to bring trespass against any one illegally taking or injuring them; but there is no provision of the kind, and we cannot supply it.

Rule discharged.

ROBERTS V. THE GREAT WESTERN RAILWAY COMPANY.

G. W. R. W. Co. - Limitation of actions-16 Vic. ch. 99, sec. 10, construction of.

The 16 Vic. ch. 99, sec. 10, limiting the time within which suits can be brought against this R. W. Co., applies only to actions for damages occasioned in the exercise of the powers given to the Company, for enabling them to construct and maintain their road; not to claims for negligence in conveying passengers.

This was an action brought to recover damages for injuries occasioned to the plaintiff, when a passenger on the defendant's railway, the carriage in which he was having been thrown off the track; and the accident was alleged to have been caused by means of their negligence and want of care.

The defendants by their plea sought to take advantage of the 16 Vic. ch. 99, sec. 10, relating to this Company, which enacts "that all suits for indemnity for any damage or injury sustained by any person or persons whomsoever, by reason of the said railway, shall be instituted within six calendar months next after the time of such supposed damage sustained," &c.—Demurrer.

Vankoughnet, Q. C., for the demurrer. Gwynne, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the Court.

We are all of opinion that the tenth section of 16 Vic. ch. 99, does not apply to an action of this nature, but only to actions for damages occasioned by the company in the exercise of the powers given, or assumed by them to be given, for enabling them to construct and maintain their railway.

This is an action charging them with negligence in the conduct of a description of business that any individual might be engaged in, without requiring the aid of legislative acts enabling them to take or use the property of others against their will.

The statute of 7 Wm. IV. ch. 14, sec. 19, expresses very clearly to what causes of action the limitation of actions was meant to extend when it is not otherwise provided in the principal statute, which we think it is not in the statute which relates to this Company.

Judgment for plaintiff on demurrer.

WALTON ET AL. V. JARVIS.

Fixtures—Sale of, while execution in sheriff's hands against vendor—Effect of severance by vendee—Statute of Frauds—New trial granted, for surprise.

Trespass against the sheriff for seizure under a Fi. Fa. The goods in question, an engine and boiler, had been in a saw mill which was burnt down, and remained there, set in brick and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them verbally to the plaintiffs, who detached them from the mill and removed them to another place, where the sheriff followed and sold under a Ven Ex. Held, that the first attempt at sale was clearly illegal, as the goods were

then fixed to the freehold and could not be taken as chattels.

Quære, whether the verbal sale was effectual, or whether the Statute of Frauds would apply—Semble, that it would not; but that the sale would, in effect, amount only to a license to the vendee to enter on the land and detach the goods: and

Quære, whether on being so severed, the Fi. Fa. would not attach upon them Where the notice of trial was received by a clerk of defendant's attorney, but the attorney, on enquiring of his clerks, was told that none had been served, and neglected in consequence to prepare for his defence, the merits appearing to be doubtful, a new trial was granted.

TRESPASS for taking and converting certain goods and chattels of the plaintiffs—namely, one engine, two cylinders, and two boilers.

Pleas-1. Not guilty. 2. That the goods were not the

property of the plaintiffs. 3. Justification under a writ of Fi. Fa. against the goods of one Fergusson, upon a judgment at the suit of Sage and Grant, entered on the 20th of April, 1855, in the Court of Common Pleas—writ delivered to the defendant as sheriff, on the 20th of April—endorsed to levy £105 1s. 3d. for damages, and £10 9s. 10d. costs, besides interest, &c.; and the goods seized thereon—averring that a writ of Ven. Ex. afterwards issued, under which the goods were sold.

Replication to the special plea, admitting the judgment and writ, de injurià absque residuo causæ.

At the trial at Toronto, before Draper, J., the evidence was to this effect:—The engine and boilers had been put up and were in use in a saw-mill belonging to Fergusson, the execution debtor, which saw-mill was afterwards burnt down and the engine and boilers remained, apparently not much injured by the fire. The boilers were set in brick work-i.e. built into a furnace and bolted to timbers under the furnace, which were sunk five feet beneath the ground. The engine was attached to the boilers and to the same timbers, and all continued thus attached to the soil after the fire as before. The execution against goods came to the sheriff's hands on the 23rd of July, 1855, being returnable on the first day of Trinity term (27th of August, 1855.) The engine and boilers, while the writ was current, were offered for sale by the sheriff's officer as they stood, under the writ of Fi. Fa., having been regularly advertised; and an attempt was made to sell them, but there were no bidders.

The execution debtor, Fergusson, was called as a witness for the plaintiffs, and he swore that he sold them (verbally) to the plaintiffs as they stood, on the 27th of August, for £100, and took their note for the sum, which note he said he "disposed of," but did not state when or to whom. The boilers he swore were worth more than £100; and that the whole were so expensive to remove, that they would be worth £250 when they arrived at Holland Landing, seven miles distant, to which place the plaintiffs took them. It was sworn by the sheriff's officer that after his ineffectual attempt to sell them at Machell's Corners, where they were set in the

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ruins of the saw mill, he put a person at first in possession, but thinking they could not be removed, he did not continue him in possession, and afterwards he heard they had been taken away, and went and found them in a street at Holland Landing; and after the return day of the writ, some time early in September, and before the writ was returned, he offered them for sale there, claiming to hold them under his former seizure made while the writ was current. Enough was not then bid for them, and he retained the articles unsold in his hands for want of buyers, and a writ of venditioni exponas was taken out, under which he sold them on the 19th of September.

The engine and boilers were detached from the furnace and timbers at six in the morning of the 27th of August, the return day of the writ, by a process which was described—viz.: pulling down the brick work which extended below the soil, and cutting the iron bolts which attached the furnace plate and the engine to the timbers under ground.

At the first attempt to sell at Holland Landing, one of the plaintiffs attended and claimed the things as his, saying he had bought them from Fergusson.

The learned judge left it to the jury to determine whether Fergusson sold and the plaintiffs bought for a valuable consideration, and whether it was a real bond fide sale intended to pass the property, not merely a colourable and pretended sale, upon a secret understanding, to defeat the execution.

The defendant's counsel objected to the learned judge's charge. He contended that the sheriff had the whole of the 27th of August to return the writ; and consequently that so soon as the engine and boilers were severed from the freehold by the plaintiffs on that day, they became bound by the writ against goods, and could not be legally sold by Fergusson; he contended, moreover, that the sale of them by Fergusson made them in effect chattels, and as such subject to the writ; that both vendor and vendees were estopped from denying that they were chattels when sold, for if they were not, then their attempt to change the property in them by a mere verbal transfer was ineffectual.

The jury found that it was an actual bond fide sale not

colourable or pretended; that the plaintiffs were not combining with Fergusson to defeat the execution; and that the boilers and engine were attached to the freehold until removed by the plaintiffs on the 27th of August, which was the return day of the writ; and they gave a verdict for the plaintiffs for £200.

Adam Crooks obtained a rule Nisi to enter a verdict for defendant pursuant to leave reserved, or for a new trial on the law and evidence, for excessive damages, and on the ground of surprise and the discovery of new evidence.— He cited Huntley v. Russell, 13 Q. B. 572; Boydell v. McMichael, 1 Cr. M. & R. 177; Trappes v. Harter, 3 Tyr. 603; Mechelen v. Wallace, 7 A. & E. 49; Jones v. Chapman, 2 Ex. 803; Burling v. Read, 11 Q. B. 904; Foster v. Smith, 13 U. C. R. 243; Samuel v. Duke, 3 M. & W. 622; Ranken v. Hardwood, 10 Jur. 794; Beekman v. Jarvis, 3 U. C. R. 280; Watson on Sheriffs, 185.

J. R. Jones shewed cause, and cited Oates v. Cameron, 7 U. C. R. 228; Ackland v. Paynter, 8 Price 95; Doker v. Hasler, 2 Bing. 479.

The facts stated in the affidavit are set out in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The writ no doubt continued in force through the whole of the 27th of August, the return day.

Upon the facts stated, we consider that before that day the engine and boilers could not have been legally bound by that writ, because they were clearly fixed to the freehold, and could not be taken under an execution against chattels. This is no case regarding a tenant's fixtures, but simply brings up the question as to what must be treated as affixed to the freehold, and as such not liable to be seized on an execution against the goods and chattels of the owner of the fee. It is precisely like the case of Winn v. Ingilby (5 B. & Al. 625), and it cannot admit of doubt that what the sheriff did, in his attempt to sell the engine and boilers while they were attached to the freehold, was illegal and nugatory.

Then it comes to be considered whether, while the things stood there attached to the freehold, it was competent to

Fergusson, the owner of the fee, to make a verbal sale of them, or whether the fourth section of the Statute of Frauds would apply.

My present impression is, that the fourth section of the Statute of Frauds does not apply to anything of this nature—affixed to the soil, but deriving no nourishment from it, like trees or grass growing; but the sale of such things so situated would in effect amount to nothing more, while they continued so attached, than a license to enter upon the land and detach them from it; and as soon as they were detached, they became chattels, I think, and subject to the writ of execution against Fergusson, which was still in the sheriff's hands; but whether the owner of the fee, at the moment of their being detached, could not transfer them by delivery to the person to whom he had verbally agreed to sell them, or whether, on being detached, they did not ipso facto become the property of the person who detached them, under the previous verbal contract of sale, notwithstanding the writ being in the sheriff's hands ready to attach upon all Fergusson's goods, may admit of doubt, and requires to be discussed more carefully than it has yet been, and with the aid of a precise knowledge of all the facts.

We are therefore disposed to grant a new trial on payment of costs, on the affidavits, on the ground that both sides of the case have not been heard, owing to an accident, such as may sometimes occur without any imputation of want of

proper care in the defendant's attorney.

Mr. Crooks swears that he inquired and was told by his clerks that no notice of trial had been served, and none was served upon himself, wherefore he took no steps for his defence, being fully under the impression that the cause was not to be tried at the assizes; and that he did not find it was to be tried until it was called on, and he was then without witnesses. A notice had however been served on one of his clerks, who put it away without saying anything about it. It is difficult either to grant or refuse a new trial for such a cause, for undoubtedly an attorney must be bound in general by notices served upon his clerks; but where we have no reason to doubt that the accident occurred, and where the

plaintiffs are in no danger of losing their verdict by delay, we think we should grant a new trial, the merits being so doubtful.

Rule absolute.

SNOOK ET AL. V. THE TOWN COUNCIL OF BRANTFORD.

Notice of action—14 & 15 Vic. ch. 54.

Held,—Affirming Brown v. The Municipal Council of Sarnia, 11 U. C. R. 215—that corporations are not entitled to notice of action.

This was an action on the case, brought by the plaintiffs as possessors of a grist-mill, in Brantford, in right of which they claimed the benefit of the water of a stream to flow to and past the mill, and a right for such water to flow from the mill, without obstruction, through a race, into the stream again below the mill; and charged that the defendants wrongfully threw earth, &c., into the stream below the mill and the race, and thereby obstructed the escape of the water, whereby the plaintiffs' mill was stopped. The second count stated the plaintiffs' right in a similar manner in substance, and charged that a street within the limits of the town of Brantford, being the property of and under the control of defendants, and leading across the said stream below the plaintiffs' mill and race, by means of a bridge or culvert, became out of repair, and a large hole was made through the said bridge or culvert; that the defendants having been requested by the plaintiffs to repair such road and bridge, it became their duty to repair the same, and in so doing to use proper care to prevent earth, &c., from falling into said stream, and thereby obstructing the escape of the water from plaintiffs' mill; yet defendants in repairing the said road and culvert, so negligently conducted themselves, that through their negligence quantities of earth, &c., were wilfully and injuriously permitted to fall through the hole in the culvert into the stream below the race, &c., and although the plaintiffs requested defendants to remove the earth, &c., and a reasonable time had elapsed, yet defendants would not remove the same, whereby plaintiffs' mill was stopped.

Pleas—1. Not guilty by statute.—2. To the first count, traversing plaintiffs' right to the flow and escape of the water of the stream as alleged.—3. To second count, a similar traverse.

The case came on for trial at the Brantford assizes, in October, 1855, before *McLean*, *J.* The plaintiffs' counsel having admitted in his opening that he was not prepared to prove that any notice of action had been served on the defendants, the learned judge nonsuited the plaintiff, with leave to move.

Burns obtained a rule Nisi accordingly, to which Hagarty, Q. C., shewed cause.

DRAPER, J.—The defendants claim the protection of the statute 14 & 15 Vic. ch. 54, sec. 2, which is as follows:—
"That no writ shall be sued out against any justice of the peace, or other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law, or is imposed by act of parliament, either imperial or provincial; nor shall any judgment or verdict be rendered against him, unless notice in writing of such intended writ, specifying the cause of action with reasonable clearness, shall have been delivered to such justice, officer, or other person, or left at the usual place of his abode, by the attorney or agent of the party who intends to sue out such writ, at least one calendar month before suing out such writ," &c.

They rest their claim to this protection on the word "person," which in the "Interpretation Act," I2 Vic. ch. 10, sec. 5, eighthly, is thus defined: The word 'person' shall include any body corporate or politic, or party, and the heirs, executors, administrators, or other legal representatives of such person to whom the context can apply, according to the law of that part of the province to which such context shall extend." Taking also into consideration the first section of the interpretation act: "that each provision thereof shall extend and apply to each act passed in this present session, or in any future session of the Provincial Parliament, except in so far as any such provision shall be inconsistent with the

intent and object of such act, or the interpretation which such provision would give to any word, expression or clause, shall be inconsistent with the context." And in sec. 5, seventhly, it is enacted that words importing the singular number or the masculine gender only, shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse."

The defendants are a corporation under the 12 Vic. ch. 81, as amended by 13 & 14 Vic. ch. 64, 14 & 15 Vic. ch. 109, 16 Vic. ch. 181. The 12th Vic. contains an interpretation clause as to the word "governor," and also as to the words importing the singular number and masculine gender, just like the Interpretation Act, though the last-named act had received the royal assent more than a month before ch. 81 did. This act provides also (sec. 155) that no action shall be sustained for anything done under any by-law, unless such by-law or the part thereof under which the same shall be done, shall be quashed one calendar month previous to the bringing of such action. The party sued may tender amends, and such tender may be pleaded; and if no more than the sum tendered be recovered, it shall be lawful for the court to award no costs to the plaintiff, and to award costs to the defendants, and to adjudge that they shall be deducted out of the verdict. The 14 & 15 Vic. ch. 109, sec. 35, provides that whenever the by-law; &c., of any municipality shall be quashed, such municipality shall alone be responsible in damages for any act done under such by-law, &c., and any clerk, constable, or other officer acting thereunder, shall be freed and discharged from any action or cause of action accruing to any person by reason of such by-law being illegal and void, or having been quashed. But none of these acts gave the municipality any privilege as to notice or limitation of action, or as to amount of costs, &c., &c.; and therefore no part of these acts are affected by the repeal contained in the ffrst section of the 14 & 15 Vic. ch. 54, which repeals "so much of any act or acts now in force in this province, whether public, local, or personal, as confers any privilege" of that character. Neither do any of these acts fall within the description contained in the preamble to the statute in question, viz.: "acts of parliament in force in Canada, both public, local, and personal, whereby certain protections and privileges are afforded to magistrates and others;" nor are any of the provisions of these acts altered or amended by this statute. If it can apply to this case at all, it must be because the legislature have evinced an intention to extend these privileges and protections to the whole body of municipal corporations throughout Canada, though the contrary intention is to be assumed from the absence of all provisions for that purpose, when the statutes erecting such corporations were passed.

Confining attention to the words of the statute itself, without for the moment adverting to the Interpretation Act, I think it impossible to contend for a moment that its own language, taken proprio vigore, affords any colour for the conclusion that the legislature had municipal corporations in view when they passed it. The title, "An Act to amend and consolidate the laws affording protection to magistrates and others in the performance of public duties"-the preamble already referred to-the repealing clause above quoted-all prohibit any such interpretation. The terms in which the protection of the second section is granted all point to an individual, not to a body corporate; all refer to justices of the peace, or to general or local officers having duties of some public character to execute and fulfil; and the concluding words of the statute appear to me to confirm this opinion-"Any such justice, officer, and other person acting as aforesaid, shall be entitled to such protection and privileges in all such cases as he shall act bona fide in the execution of his duty, although in such act done he shall have exceeded his powers or jurisdiction, and have acted clearly contrary to law." All the language of the act is applicable strictly to the personal acts of an individual or individuals, and cannot, I apprehend, be applied to a corporate body without a strained and unnatural construction.

All therefore, in my opinion, must rest on the effect of the Interpretation Act. If that statute had said peremptorily, that in all acts to be thereafter passed the word "person" should include every body corporate, we must have given it that construction, however repugnant it might have appeared

to an otherwise plain intent; but the enactment is not peremptory. The word "person," is not to be so interpreted, if it shall be inconsistent with the intent and object of the act, or with the context; and whether it be so or not must be considered and decided before the word "person" receives that interpretation. It would be easy to cite numerous instances in which so to interpret the word "person" would be entirely repugnant to the sense and object of the statute in which it is used (take, for example, the Census Act, 14 & 15 Vic. ch. 49). It is therefore only necessary to enquire whether the object and intent of this act, and the context of it, in reference to the word "person," shew that it was or was not intended to apply to our municipal corporations.

With all respect for the opinions of others, I must say I feel no doubt that such an interpretation would be inconsistent with the intent and object of the statute under consideration:

- 1. Its expressed intention is to amend and consolidate laws affecting individuals only, and the words, used in their natural sense, are consistent with that intention.
- 2. The language of the second section, as pointed out in the judgment delivered by my brother Burns in Brown v. The Municipal Council of Sarnia (11 U. C. R. 215), indicates proceedings against individuals.
- 3. Municipal corporations, under the 12 Vic. ch. 81, or the subsequent acts, have never had so extended a protection conferred on them, though their liability to damages was under consideration in 14 & 15 Vic. ch. 109, sec. 35, and parties acting under the illegal by-laws are exempted from liability; and in 13 & 14 Vic. ch. 15, sec. 1, where there is a provision for the action being brought within three calendar months, the civil liabilities of such corporations, in cases where they were indictable, was declared, but without the protection of notice or right to plead not guilty per statute; there is only a limitation of time as to the bringing the action.
- 4. The plaintiff could bring no action for any wrong done to him under colour of an illegal by-law, till one month after the by-law complained of is quashed. If the act 14 & 15 Vic. ch. 54 applies, then a month's notice must be given

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before the writ is sued out, and the writ must be sued out within six calendar months after the act committed. Now if the act were committed, for example, on the 1st of February, it is not too much to suppose that the party injured could not apply to quash the by-law until Easter Term; and, considering the time necessary to elapse after serving the rule, before it could be made absolute, the argument would not take place till towards the end of the term; and the judgment of the court would not probably be given until the Tuesday week after the term, which could not be earlier than the 23rd of June; and, assuming the plaintiff to have given his notice so as not to lose an hour, he could not sue out his writ before the 23rd of July, or in fact till very near the six months would have expired. So that cases might occur in which a party would have little more than a week within which he could sue out his writ, and bring his suit. And if we further consider the provisions of 13 & 14 Vic. ch. 15, then in many cases it would deprive a plaintiff of any remedy, unless we hold that that latter act is repealed by the 14 & 15 Vic. ch. 54-a conclusion I am not at present prepared to adopt. And under the most favourable circumstances a party obliged to get a by-law quashed, as a preliminary to his commencing such an action, would be placed under more disadvantageous circumstances than those who were suing individuals entitled simply to the protection of the 14 & 15 Vic. ch. 54; for it will not, I presume, be contended that the first section of that act repeals the provision of the 12th Vic. relative to the quashing of the by-law.

For these reasons, I am of opinion that this nonsuit should be set aside.

Burns, J.—With all due respect for the opinion of the Court of Common Pleas, in the case of Read v. The City of Hamilton (a), that corporations are entitled to notice of action by reason of the operation of the Interpretation Act overriding the statute 14 & 15 Vic. ch. 54, so as to make the word "person," used in the latter, apply to corporations, I

⁽a) Not yet reported. See also Croft v. The Town Council of Peterborough, 5 C. P. 141; and in Barclay v. The Municipality of Darlington (not yet reported), the Court of Common Pleas have affirmed their previous decision on this point.

must still entertain the opinion I expressed in the case of Brown v. The Municipal Council of Sarnia. In addition to the reasons there given by me, which led to the conclusion that the legislature did not intend to confer a privilege of exacting a notice, where it had not been previously provided for by law, the following having occurred to me. We find, after the passing of the Interpretation Act, that the legislature has used the same language as to corporations being entitled to plead the general issue and give the special matter in evidence, as had been used previously, without any provision for notice of action to be served. We find the legislature also making the same provision after the passing of the 14 & 15 Vic. ch. 54, for pleading the general issue and giving the special matter in evidence. The statute 13 & 14 Vic. ch. 15, enacts that certain Municipal Corporations shall be civilly responsible for damages, provided the action be brought within three months from the time the injury shall be sustained. In this act no provision is contained for service of notice, or for enabling the corporation to plead the general issue and give the special matter in evidence. Now it is strange, if the legislature intended the 14 & 15 Vic., ch. 54 to apply to corporations, by force of the Interpretation Act, that it should have been left upon so undefined a footing as, that if applied to corporations under the 13 & 14 Vic., ch. 15, it must have the effect of curtailing the action of the party aggrieved to two months instead of three, and to the extent of saying that the corporation shall be civilly responsible, provided the action be brought within three months, it must repeal that provision, and compel the party to serve a notice some time within two months, in order that he may sue out a writ within three months. I do not suppose it would be contended that the effect is that an action could be sustained, if commenced after the expiration of three months. I do not think the legislature supposed the statute 14 & 15 Vic. ch. 54 applied to such a case. Again: In the same session the legislature incorporated the Bytown and Prescott Railway Company, (13 & 14 Vic. ch. 132); and in the 50th section of the act enacted that every action brought for any thing done under that act should be brought within six

months after the fact committed, and that the defendant or defendants might plead the general issue and give the special matter in evidence. If the statute 14 & 15 Vic. ch. 54 be held to apply to corporations, it must follow that the second section repeals that provision in the other act, quoad the limitation of time for bringing the action and privilege of pleading the general issue. Now although the pleading of the general issue is again provided for in the 14 & 15 Vic. ch. 54; and, by the 8th section, the time for bringing an action is limited to six months after the act committed, and so far may be said to be in accordance with the 13 & 14 Vic. ch. 132; yet if the 14 & 15 Vic. ch. 54 is held to apply to corporations, I confess I do not see how it can be argued that under the statute 13 & 14 Vic. ch. 15, instead of the action being limited to three months, it must be held to be extended to six months, by force of the 8th section of 14 & 15 Vic. ch. 54.

The statute respecting the formation of road companies, passed since the statute respecting notice of action-viz., 16 Vic. ch. 190-in the 53rd section, makes the same provision respecting the pleading of the general issue and giving the special matter in evidence. I apprehend in the construction of this act it could never be contended that the corporation was entitled to notice of action, because a notice to be given is not provided for ; and, being passed since the other act, it shews that the legislature did not certainly imagine that by force of the act respecting notices of action it was supposed the pleadings of the general issue was a privilege conferred, unless expressly granted. The whole argument in applying the 14 & 15 Vic. ch. 54, to corporations, must be based upon the assumption that the construction of the Interpretation Act, which was made to apply to future acts as well as those previously passed, overrode the other, and so made it apply to corporations up to that time. The answer to that, independent of the reasons given by me on a former occasion, is, that we find the legislature making provision for the limitation of actions, and for pleading the general issue, in cases of corporations, in the same manner as had previously been the case, without any reference to the act respecting notices of action. I have no doubt other acts of incorporation might be cited with similar provisions. On the former occasion, I endeavoured to shew, from the internal evidence of the act itself, that it did not apply to corporations; but now I have attempted to shew by external evidence; derived from other acts, that the legislature did not contemplate that the 14 & 15 Vic., ch. 54, did more than provide for consolidating the several laws upon the subject, so far as respects individuals. How far I may have convinced others, I know not; but to my mind my argument convinces me the legislature only supposed it was dealing with the cases of individuals. I think the nonsuit was wrong, and should be set aside.

Robinson, C. J., concurred. (a)

Rule absolute.

MAGRATH V. THE MUNICIPALITY OF THE TOWNSHIP OF BROCK.

Pleading—Duplicity—Notice of action to corporations—14 & 15 Vic. ch. 54.

Trespass against a municipality for breaking and entering plaintiff's close. The defendants in their plea set out the petition of the householders for a road to be opened running across this lot, the survey and report thereon, the by-law confirming the road; that the plaintiff claimed damages for such road passing over his land, and was awarded £2 10s., which he accepted in satisfaction of such damages; and they allege that the trespasses complained of were necessarily committed in opening and making said road in pursuance of said by-law.

Held, on demurrer, that the plea was not double, and that it shewed a good defence—Held, also, McLean, J., dissenting (confirming Brown v. Municipal Council of Sarnia, 11 U. C. R. 215), that the defendants were not

entitled to notice of action.

TRESPASS for breaking and entering plaintiff's close being the east half of lot 16, in the 9th concession of Brock, throwing down fences, and destroying the grass and crops, &c.

Fifth plea—that before the said times when, &c., to wit, on, &c., John Hall Thompson, then being surveyor of highways in and for the said township of Brock, duly appointed by the defendants for that purpose, was required and requested, by a requisition in writing, signed by a large number, to wit, twelve persons, then being residents and householders of the township of Brock, to examine and lay out a road from the 7th concession to the 11th concession in the township of Brock, in, over, and across the east half of lot 16, in the

⁽a) See the next two cases.

9th concession of the said township, being the said close in which, &c.; that he, the said J. H. T., then being such surveyor as aforesaid, in pursuance of and in compliance with said requisition, did afterwards, to wit, on, &c., as such surveyor, lay out a new line of road in, through, over, and across the said east half of lot 16, in the said 9th concession of the said township of Brock, being the said close in which, &c.; and that he, the said J. H. T., did afterwards, and before the said times when, &c., he the said J. H. T., then being such surveyor as aforesaid, to wit, on, &c., duly report the said line of way so laid out to the defendants; and the defendants further say that they did afterwards, and before the said times when, &c., to wit, on, &c., make a by-law confirming the said line of way in these words and figures following—that is to say:—

"By-law No. 11: To confirm a line of road from the front of the 7th concession to the 11th concession of the township of Brock.—Be it enacted by the Municipality of the Township of Brock, that the road laid out and surveyed by John Hall Thompson, Esq., road surveyor, from the front of the 7th concession to the 11th concession of Brock, as appears by his report bearing date the 27th of December, 1850, be, and the same is hereby established as a public road or highway, on the first line described in said report, and said road be three rods wide."

That the plaintiff afterwards, to wit, &c., and before the said several times when, &c., appeared in his own proper person before the defendants, and then made claim for compensation for damages sustained by him for the passing of such bylaw, and for the injury which he would sustain in consequence of the opening of said road through the said close, in which, &c.; and the defendants then awarded the plaintiff the sum of £2 10s., in satisfaction and compensation of his said damages, and the plaintiff then accepted the same in such full satisfaction and compensation; and the defendants further say that they did afterwards, to wit, on, &c., and before the said several times when, &c., amend the said bylaw by inserting therein these words "And which reports are hereto appended;" that the said line of way so described in the said report, and confirmed and established by the said

by-law so amended and passed in and through the said close of the plaintiff, in which, &c., and that the same did not run through or over, or touch upon any dwelling-house, barn, stable, or out-house, or any orchard, garden, yard, or pleasure grounds; and thereupon, after the making of the said by-law, and the amendment of the same, and a reasonable time before the said several times when, &c., due notice was given to the plaintiff that the said road or highway had been laid out in and through the said close of the plaintiff, in which, &c.; that after the making of the said by-law so amended as aforesaid, and after giving of the said notice to the plaintiff, and after a reasonable time after giving such notice had elapsed, and after the said line of road had, by virtue of the said by-law, been confirmed and established as a road or highway, they, the defendants, did at the said several times when, &c., under the authority of the said bylaw, and acting in the execution thereof, proceed to open and establish, and did then open and establish the said road or highway by the said by-law directed, through the said east half of lot 16, in the 9th concession of the township of Brock aforesaid, being the close of the plaintiff, in which, &c., in the declaration mentioned, as directed by the said by-law, and as the same had been laid out and surveyed by the said J. H. T., in the said by-law mentioned, and being the line of road so laid out as aforesaid; and in opening the said highway, and necessarily for the purpose of carrying into effect the said by-law, did break and enter the said close in which, &c.; and because the fences of the plaintiff were then standing across the said highway so ordered to be opened, and the said road was thereby kept shut and closed by the plaintiff, and the defendants, as they lawfully might for the cause aforesaid, did necessarily prostrate and throw down the said fences, and remove them from the said highway; and the defendants did then necessarily for the purpose of levelling, digging, heaping up, and removing obstructions from the said highway, with cattle and horses, plough and upturn the soil of the said close, being in and upon the said line of highway, and because grass and corn of the plaintiff before then sown and placed in the said close, in which, &c., in and upon

the said line of road, was still left standing and growing thereon by the plaintiff, therefore the defendants, in opening and levelling the said road, did necessarily, with feet in walking, and with horses and cattle, trample upon and cut up the said soil of the said close in which, &c., being in and upon the line of the said highway, and the grass and corn growing thereon, and did necessarily upturn the grass and crops thereon growing and being, que sunt eadem—Verification.

The last plea set up as a defence that no notice of action was given to the defendants.

Demurrer to the fifth plea-That it does not shew that due or proper notice was given of the passing of the by-law therein mentioned, or of the opening of the road therein also mentioned; that it is double, for therein it is sought to set up a payment in satisfaction of the trespasses complained of, and also a justification under a by-law; that it is uncertain, for it does not show or disclose whether the road therein mentioned was established by a void or by a valid by-law; the said plea does not shew any highway or road duly established, for the court cannot from said plea adjudge whether the road therein mentioned was, or is laid down in a manner according to law; that neither said plea, nor the by-law therein set forth, shews or describes any defined line of road or highway, so that the plaintiff cannot take any certain or material issue thereon; that said plea is in other respects insufficient.

Demurrer to the last plea, as shewing no defence. Hallinan for the demurrer. McMichael contra.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that we should hold the fifth plea to be insufficient. Any objection as to the description of the road in the by-law not being such as to shew its situation with certainty was waived in the argument, on account of the amendment by the subsequent by-law having made that point plain.

Then, as to the exception on the ground of duplicity in the plea, we do not think it lies. It is one of those special pleas in which all the facts stated are clearly meant to lead to one

conclusion, and in which it would be unreasonable to hold that the various matters are stated with the design of setting up several defences. The defendants here set out the petition of the freeholders, the survey and report, the by-law confirming the road, the claim of the present plaintiff for damages in consequence of so laying out the new road over his land, the payment of the damages by the defendants, and the acceptance of the money by the plaintiff in satisfaction of his alleged damage; and the defendants by this plea put it to the court, whether the plaintiff, after all this, can legally sue for a second satisfaction for the same alleged injury.

We think he cannot, but is bound by a satisfaction he has received, and is precluded from raising any question whether proper notice was given of the by-law before it was passed. If he meant to dispute the legality of the defendants' acts in establishing the new road, he should not have applied for and received the compensation, which implies an acquiescence on his part in what had been done.

We are of opinion that the defendants are entitled to judgment on the fifth plea.

As to the last plea, it sets up as a defence that no notice of action was given to the defendants, which brings up the same point that was decided in this court in Brown v. The Municipal Council of Sarnia (11 U. C. R. 215); and in accordance with that decision, we give judgment for the plaintiff on the demurrer to that plea, not considering that it was necessary to give notice of action to the corporation under 14 & 15 Vic ch. 54, sec. 8.

The Court of Common Pleas has taken, as we are aware, a different view of a question on which it is evident that there is room for a difference of opinion; and it is probable therefore that the doubt will be removed by legislation, or it may be removed upon appeal from our decision.

McLean, J.—I have already given judgment in the case referred to in the Common Pleas, concurring in the decision of that court that corporations are entited to notice of action. I still adhere to this opinion, and must therefore be consider-

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ed as dissenting from the judgment just delivered, so far as regards the last plea.

Burns, J., concurred in opinion with the Chief Justice. Judgment for defendants on demurrer to the fifth plea. Judgment for plaintiff on demurrer to the last plea. (a).

McKenzie v. The Mayor, Aldermen, and Commonalty of the City of Kingston.

Held, that the 14 & 15 Vic. ch. 54, sec. 8, as to limitation of action, does not extend to corporations—McLean, J., dissenting.

The simple question raised in this case, upon demurrer to the defendants' plea, was, whether the 14 & 15 Vic. ch. 54, sec. 8, applies to corporations, so as to compel suits against them to be brought within six months after the act complained of.

R. A. Harrison, for the demurrer.

ROBINSON, C. J.—It has not been pointed out to us that in any of the municipal council acts there is a provision contained limiting the time within which actions generally must be brought against corporations for anything done on the execution or intended execution of the power committed to them, and we are not aware of any such provision.

The claim therefore of the defendants in this case to have the action against them brought within six months, if brought at all, must rest on the general statute 14 & 15 Vic. ch. 54, passed for "affording protection to magistrates and others in the performance of public duty.

The eighth clause of that act provides that "no action or suit shall be brought against any justice, officer, or other person acting as aforesaid, for anything done by him in the performance of his public duty as aforesaid, unless commenced within six calendar months after the act committed.

What is meant by the words "acting as aforesaid" we learn by turning back to the second clause, where it is provided "that no writ shall be sued out against any justice of the peace, or other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law, or is imposed by act of Parliament, either imperial or provincial," unless notice in writing, &c., shall be given one calendar month before suing out the writ.

We have determined in this court that, under this statute, a corporation is not entitled to notice of action; and it seems to be in accordance with that view of the statute to determine also that upon the same principle which we stated in Brown v. The Municipal Council of Sarnia (11 U. C. R. 215), the provision in the same statute as to the limitation of actions does not extend to a corporation. The question turns upon the point whether the word "persons" as used in the eighth clause of 14 & I5 Vic. ch. 54, after the words "justice or officer," can properly be held to include corporations. It could not be so held without the aid of the Interpretation Act. 12 Vic. ch. 10, which provides in its fifth section that the word "person" shall include any body corporate or politic to whom the context can apply. Whether with the aid of that statute the word "persons," as used in the eighth clause of 14 & 15 Vic. ch. 54, should be held to include bodies corporate appeared to me doubtful when it was first brought up for consideration in this court in the case of Brown v. The Municipal Council of Sarnia; and in consequence of that doubt we took time to consider it, and we all came to the conclusion, that, taking the two statutes in connection, corporate bodies could not by a reasonable construction be held entitled to notice, having due regard to the spirit of the Interpretation Act, 12 Vic. ch. 10, which enacts in its first section "that each provision thereof shall apply to each act to be passed in any future session, except in so far as any such provision shall be inconsistent with the intent and object of such act, or the interpretation which such provision would give to any word, expression, or clause, would be inconsistent with the context. The grounds on which we thought this exception seemed to exclude the application of the Interpretation Act in the present instance we expressed in the judgment of the court; and in addition to the considerations which are mentioned there, it is to be observed that, considering the provision which requires actions brought against a municipality for acts done under an illegal by-law, which has been quashed to be brought within a certain time, if a notice of action under the statute 14 & 15 Vic. ch. 54 were required to be given to all corporate bodies, it might in some cases deprive the party of his remedy.

The Court of Common Pleas, we are aware, has decided differently; and we have endeavoured to reconcile the views of the judges of the two courts, but have not been successful.

We must therefore abide by what we have already determined, as our opinions continue unchanged; and on the authority of Brown v. The Municipal Council of Sarnia, we give judgment for the plaintiff on this demurrer.

MCLEAN, J., dissented from the judgment for the reasons given by him in the last case.

Burns, J., concurred with the Chief Justice.

Judgment for the plaintiff on demurrer (a).

IN RE HAWKE AND THE MUNICIPALITY OF WELLESLEY.

Sale of town hall—By-law for levying rate.

The municipality of a township have authority to dispose of the town hall and the site on which it stands, when they think that another situation would be more convenient.

The by-law in this case provided that any money above the proceeds of the old hall, required for the erection of the new one, should be levied on the ratable property in the township, but it did not fix the amount or the rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad.

On the 28th of April, 1855, the Municipality passed a by-law to authorize the sale of the township hall in the village of Hawkesville, which provided—1st, That the said township hall be sold by public auction to the highest bidder, and the proceeds applied to the building of another township hall, on the south-east angle of lot No. 12 in the seventh concession of the western section of the township of Wellesley, that being a more central situation.

2nd, That the proposed hall shall be erected and finished within the present year; and that any money required over

and above the proceeds arising from the sale of the present hall shall be levied on the ratable property in the township of Wellesley; one half of the sum required to be levied and collected in the present year, and the other half in the year 1856.

3rd, That Mr. R. R. of No. 11 in the first concession, Mr. John Yeager, and William Hastings, be commissioners to draw plans and specifications, and to superintend the building of the said hall, and that they be empowered to draw upon the treasurer for the amount required.

M. C. Cameron moved to quash this by-law, for the following reasons, among others:—That it does not fix the amount to be raised and levied for the erection of the new hall, and puts no limit to the cost of the building, and is in this respect vague and uncertain: Also, because it does not fix the amount of rate in the pound to be levied: Also, because it authorizes a debt to be incurred and the levying of a rate to discharge it, without containing the recitals or provisoes required by the statutes in such cases: Also, because it authorizes the persons named in it to draw upon the treasurer to an unlimited amount, which is impolitic and illegal.

Read shewed cause, and cited Sells and the Municipality of St. Thomas, 3 C. P. 290.

Robinson, C. J., delivered the judgment of the court.

It does not appear to us that there can be any doubt as to the authority of the Municipality to dispose of the town hall and the site on which it stands, when they think that a new town hall in another situation would be more convenient for the public. The 12 Vic. ch. 18, sec. 31, seems to give them that power, and without any restriction upon the exercise of their discretion.

The first section therefore of the by-law is unexceptionable; but the second and third sections are in our opinion illegal, for the reasons given in the statements of objections taken by Mr. Cameron; and so much of the by-law must therefore be quashed.

WHITTIER V. McLENNAN.

Sale of lands-What constitutes a speciality-Promise to "deliver conveyance"-Purchase money due on Sunday.

Where a seal is set opposite to the name of the party signing, the document must be treated as under seal, although the testatum is "I hereby subscribe myself.

A promise to deliver a conveyance includes a promise to execute it. Where the day on which money is due under an agreement falls on Sunday, semble that the payment must be made on Saturday.

Assumpsit on a contract for the sale of a town lot in Goderich, averring that the defendant agreed to deliver the deed to the plaintiff on or before the 1st of April, 1855, and that the plaintiff was ready and willing, and tendered and offered to pay to the defendant, on the 1st of April, 1855, the price of the lot, on the delivery of the deed.

Pleas-1. Non-assumpsit. 2. That the plaintiff did not tender and offer to pay the defendant as alleged.

At the trial at Goderich, before Burns, J., the agreement produced was as follows:

"Goderich, March 16th, 1855.

"To Smith Whittier, Esq.

"Sir,-I accept of your offer to purchase my lot cornering on Victoria and Newgate streets, at your terms and times, being one hundred pounds on the delivery of the deed, one hundred pounds nine months from the said delivery of deed and one hundred pounds eighteen months from the same, the whole purchase money being three hundred pounds; and the deed of the same to be delivered on or before the first day of April, 1855, and as above—the whole to be paid in eighteen months from the first of April, 1855.

"In witness, I hereby subscribe myself Your obedient servant,

(Signed) MARTIN MoLENNAN. [L. S.] William Wallace., George Swanson."

It was proved that the plaintiff on the 2nd of April, (the 1st being Sunday) tendered £100 to the defendant, and asked for the deed, but the defendant refused to receive the money, or give a conveyance.

The defendant's counsel objected to the plaintiff's recovery, on the following grounds:-1. That the agreement produced being under seal, assumpsit would not lie upon it, but covenant. 2. That the declaration did not allege any promise to

execute a conveyance, but only a promise to deliver the deed to the plaintiff. 3. That it was incumbent on the plaintiff to prove that he tendered a conveyance for execution at the same time that he offered to pay the money.

The learned judge overruled the latter objection, on the ground that the question between the parties was not whose duty it was to prepare the conveyance, as the defendant refused to take the money, and declared he would not convey the land to the plaintiff, because the bargain was unfair in its inception; but he reserved leave to the defendant to move to enter a nonsuit on the other objections, if the court should think them entitled to prevail.

The jury found for the plaintiff and damages £25. Becher obtained a rule nisi to enter a nonsuit.

John Wilson shewed cause, and cited Davidson v. Cooper, 13 M. & W. 343; Chitty on Con. 3, 4, 8; Com. Dig. "Fait A," 3, 4; Dabble dem. Jones v. Elstol, 7 Mod. 456; Cloud v. Nicholson, 8 Mod. 242.

Becher contra, cited Com. Dig. "Covenant" A. 2; 1 Ch. Plg., 115, 116, 132.

ROBINSON, C. J., delivered the judgment of the court.

Notwithstanding the Nius Prius decision of Clement v. Gunhouse (5 Esp. 83), we are of opinion we cannot do otherwise than treat the letter of the defendant as a document under seal. It is subscribed formally in the presence of witnesses, and has a seal set opposite to the signature of the defendant in the usual manner. It is true that he says "In witness I hereby subscribe myself," but we cannot say that it is indispensable to the creation of a speciality, that besides sealing the party should expressly affirm that he seals it.

Upon this objection alone we think a nonsuit should be granted. The only other objection that was reserved as ground of motion for nonsuit, is, that the declaration does not aver a promise to execute a conveyance, but only to deliver. A conveyance however could not be delivered without having been first executed, and indeed till execution it could not exist, and therefore the promise to deliver a conveyance necessarily involves a promise to make one; but besides the

objection is to the sufficiency of the declaration, not of the evidence, and is not properly a ground of nonsuit according to the present system of proceeding at Nisi Prius.

The merits of the case turn upon the point whether the plaintiff came too late with his money. If he did, of course the defendant was no longer bound by his contract; and I am disposed to think he was too late, though I am aware that in a case of this kind, where the day of performance falls upon a Sunday, the question has been considered a doubtful one, whether the party who should make the payment is in time on the Monday, or whether he should pay on the Saturday.

The practice in regard to negotiable paper does not govern, because that rested till lately on mercantile usage merely, and is now regulated by a statute, 13 & 14 Vic. ch. 23, sec. 5, which extends only to contracts of that kind.

I am inclined to think that the plaintiff in this case should have come on the Saturday, if the money could not have been tendered on the Sunday, but am not confident that the law is so settled; and it is to be considered that the plainsiff here alleges a tender on the 1st of April, which the defendant denies: the issue is therefore taken upon that, and the proof was, that the tender was made on the 2nd of April.

The point in the case, however, is not necessary to be determined, if, as we think, the plaintiff was bound to declare in covenant.

Rule absolute.

WHITE V. MANNING.

Sealed agreement-Right to sue on common counts.

Where the plaintiff entered into a contract under seal to deliver timber of certain specified dimensions, and the timber delivered fell short of the size, but was accepted and used. Held, that he might recover on the common counts.

Assumpsit on common counts. Plea-Non-assumpsit.

The plaintiff had entered into a sealed contract with the defendant for delivery of a quantity of timber of certain specified dimensions and quality. It was to have been inch

thick, but fell short of that, nevertheless it was accepted and used. It was required for fencing, and was sworn to be of good quality for that; all had been delivered.

At the trial at Toronto, before *Draper*, J., the defendant's counsel moved for a nonsuit, on the ground that the special contract should have been declared upon, although it was executed, and the defendants had used the timber. The objection was overruled, and a verdict rendered for the plaintiff of £144.

E. C. Jones moved for a rule Nisi for a new trial on the law and evidence, and for misdirection, citing 1 Saund. 28; Yates v. Aston, 4 Q. B. 182; Burnett v. Lynch, 5 B. & C. 589; Baber v. Harris, 9 A. & E. 532; Atty v. Parish, 1 N. R. 104.

ROBINSON, C. J., delivered the judgment of the court.

It is clear such an objection only applies where there could be a remedy on the deed, which in strictness there could not be here, unless the lumber delivered agreed with the specifications. If it were true that the lumber had been delivered, exactly corresponding with the agreement, then it would be a completely executed contract, no longer open and executory, and the plaintiff might sue on the common counts, notwithstanding there was a special agreement, provided that agreement were not under seal; but here, the original contract being by specialty, the plaintiff was bound to declare on it, if he had complied with it, so that he could have a remedy under it, and if it had not been rescinded.

It all therefore turns on the plaintiff not having delivered such lumber as he had engaged under seal to do, and the evidence certainly shewed that he did not. The refusal to nonsuit therefore was proper, though not perhaps for the reason stated at the time.

It would be to no purpose in such a case to grant a new trial, since the plaintiff's right to recover is clear upon the evidence, and the court would allow an amendment of the pleadings, if it were necessary, before another trial could take place; but it really does seem from the evidence that the plaintiff's remedy lies more clearly on the common counts,

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than in any other form, and he would have found it difficult to sustain his action on the sealed agreement, because, if the defendant had traversed his allegations of the delivery of such lumber as the contract called for, we apprehend the jury must have found against him upon that issue.

Rule refused.

DRIGGS V. BAND ET AL.

Infringement of patent-Residence of patentee-Previous patent in U. S .-Immaterial issue.

Action for infringement of a patent by the assignee. Plea, amongst others' that the patentee was not, at the time of granting of the patent, a resident in this province. The evidence shewed that the patentee had lived in the United States for many years before 1850, when he came to Canada, leaving his family behind him, and applied for the patent; he remained until about three weeks after it was obtained, and being unsuccessful in disposing of it, he returned to the States, where he had since continued; and where he afterwards sold his right to the plaintiff; before coming to this province, he had obtained a patent for this invention, as a citizen of the United States. A verdict having been found for defendant generally, although there were other issues which the plaintiff was clearly entitled

Held, that it would be useless to grant a new trial, because, although the issue taken was immaterial—the statute requiring residence only at the time of making application for the patent-yet the evidence shewed clearly that the patentee was not then a resident, and the defendant would be

allowed to amend his plea.

Semble, per Robinson, C. J., that the inventor must also be a resident at the time when he makes the discovery.

Quere, as to the effect of the patentee having previously obtained a patent

in the United States.

This action was brought for the violation of a right secured by patent, issued to one David P. Bonnel, as the inventor of "a new and useful improvement in the process of grinding and manufacturing wheat and other grain into meal and flour," which patent bore date on the 20th of March, 1850, to hold for a period of fourteen years from the date. The first count of the declaration alleged that David P. Bonnell was a subject of our lady the Queen, and resident within the province, and set forth the granting of the letters patent to the said David P. Bonnell, and thereby giving and granting to him, his lawful representative and assigns, and his and their deputies, servants, agents, or such other as the said patentee, or his lawful representatives and assigns, should at any time agree with, and no others, during the term of four-

teen years, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery, within the province of Canada. After reciting the terms of the patent, it alleged that David P. Bonnell, the patentee, on the 1st of May, 1850, by a certain indenture, for the consideration therein mentioned, did, amongst other things, grant, assign, and set over unto the plaintiff, his executors, administrators, and assigns, the said letters patent, and all the right, title, and interest of him the said David P. Bonnell, of, in, and to the said invention so granted to him, to hold the said letters patent and the said invention to the plaintiff and his executors, &c., in as full, ample, and beneficial a manner as the same might be held by him, the said patentee, by virtue of the said letters patent, for and during the residue of the term of fourteen years, which said assignment was within two months from the date and execution thereof, to wit, on the 7th of May, 1850, duly recorded in the office of the provincial secretary of the province, pursuant to the statute in such case made and provided. The breach in the first count was, that the defendants, intending to injure the plaintiff, and to deprive him of the profits of the said invention, after the making of the said letters patent and the said indenture, and within the said term, to wit, on the 1st day of January, 1854, and on divers other days and times, and within that part of Canada called Upper Canada, unlawfully and unjustly, and without the leave and license of the plaintiff or the said David P. Bonnell, did use and put in practice the said invention or discovery, and improvement in the process of grinding and manufacturing wheat and other grain into meal and flour, in breach of the said letters patent, and against the privileges granted to the said David P. Bonnell and his assigns.

The second count was for imitating in part the said invention, and in part using and putting in practice the said invention and imitation of the said improved plan or process of the patentee, in breach of the letters patent, and against the privilege thereby granted—to the plaintiff's damage of £500.

Pleas-1. Not guilty. 2. That David P. Bonnell was not the true and first inventor. 3. That the alleged inven-

tion had been in public use before the application for a patent. 4. That David P. Bonnell, at the time of the granting the patent, was not a subject of Her Majesty. 5. That at the time of the granting of the patent David P. Bonnell was not a resident within the province. 6. That at the time of the assignment to the plaintiff Bonnell was not a subject of Her Majesty. 7. That at the time of the assignment David P. Bonnell was not a resident of the province. 8. That the alleged invention was of no general or public benefit. 9. That no such description was given of the invention, and of the manner of compounding the same, as to distinguish the same from all other things before known, and to enable any person skilled in the art or secret of which it is a branch to compound and use the same. 10. That the drawing, description, and specifications, do not contain the whole truth relative to the invention. 11. That the drawing, &c., contain more than was necessary.

Issues taken on all the pleas except the 6th and 7th, which were demurred to.

At the trial at Niagara, before Richards, J., the patentee was called, and stated that he was born in Canada, in October, 1812, as he always understood, and resided there till he was ten or twelve years old, when his father removed from the province into the United States, from which country his parents had previously come into Canada; that he lived in the United States from that time up to the month of November, 1849, having a house of his own in Tecumseth, in the State of Michigan, and a family there; that in November, 1849, he came with the plaintiff from Detroit to Sandwich; and after being ten days or two weeks there, applied to the government for a patent for the improvement which he had discovered in the mode of grinding wheat and other grain into meal and flour; that the patent was not obtained till March, 1850; and in the interval from November till March, he lived in a tavern at Sandwich; that after obtaining the patent he was two or three weeks about St. Catharines and Dundas, and not meeting with much encouragement, he went-back to the United States, where he had previously obtained a patent for the same discovery, and where he had since continued to reside; that the plaintiff, before coming over to Sandwich, had purchased one third of the right expected to be procured in Canada, and advanced money upon it, and subsequently, in the fall of 1850 or winter of 1851, purchased the remainder of the patent at Tecumseth, in Michigan, where the patentee was at the time residing. On being recalled at the close of the plaintiff's case, this witness stated that he had obtained a patent as a citizen of the United States in August, 1849, that he intended when he came into Canada, to settle in the province, and bring the improvement into notice, and remain for life, if he found encouragement; but not meeting with encouragement, he returned to the United States. By his testimony, and by the evidence of a Mr. Spalding, the owner of extensive mills at Lockport, and the purchaser of the patent right for the county of Niagara, as well as from the testimony of Mr. Ranney, the proprietor of several large milling establishments at St. Catharines and Thorold, and several other persons of experience in the business, it was shewn that the discovery made by the patentee, Bonnell, was one of great value to the trade. Spalding stated that his mills usually turned out about sixty thousand barrels of flour in the course of a year, and that in grinding that quantity, by adopting Bonnell's improvement, he thought he would save ten thousand bushels of wheat; and Ranney stated that by its adoption he thought he had made £2000 per annum over the old system. the witnesses declared that previous to the introduction of the improvement by Bonnell they had not seen the system in use, and there seemed to be sufficient evidence to establish that Bonnell was in fact the discoverer.

At the close of the plaintiff's case, Connor, Q. C., moved for a nonsuit on the grounds—1st. That the using of an auxiliary run of stones for grinding what is called the offal, was claimed as part of the invention in the patent and in the specification accompanying it, whilst the evidence shewed it was in use before, and it is now disclaimed as a new invention per se. 2nd. That the matter which is claimed as the real improvement is not, under our laws, the subject of a patent. 3rd. That there was a patent existing in the United

States at the time it was applied for here. 4th. That it was used in the United States before a patent was applied for here. 5th, That at least one-third of the benefit in the patent was for an acknowledged American citizen at the time of the application. 6th. That the advantage of grinding higher is claimed as a material improvement, and a material part of the patent, but is not so set forth in the specification, or patent, or description. 7th. That there is no evidence of the residence of Bonnell in Upper Canada, within the meaning of the statute, before his application for a patent. 8th. That the specification does not sufficiently shew how the patentee intended to produce the benefit for which a patent was claimed.

These objections were overruled, but with leave to the defendants to move on them in term. No witnesses were called for the defence, and the learned judge told the jury that as to the plea of not guilty the admission of the defendants was sufficient to justify them in finding for the plaintiff: that the evidence was such as shewed that Bonnell was the discoverer of the plan of grinding all the offal together in a separate run of stones; that the idea of grinding the middlings alone in that way was known before, but taking all the offal away and grinding it together seemed from the evidence a new discovery, and that discovery, from the evidence, seemed to have been by Bonnell, and that the evidence of Bonnell, if believed, would warrant a verdict for the plaintiff as to that: that the jury must say whether the residence in Canada was colourable or bona fide, and they must take into consideration all the facts—that he was a resident of the United States, and had a house and property there; that he had got a patent there, stopped at Sandwich a week or ten days, and then applied for a patent as a resident; and two or three weeks after obtaining it returned to the United States:-that if at the time of the application Bonnell was really a resident in Canada the jury should find for the plaintiff, but if he merely came over to get a patent, intending to return to the United States, then the residence was colourable, and they should find for the defendant; that as to the invention being one of general and public benefit, there was abundance of evidence to warrant the jury in finding for the plaintiff.

The jury found a verdict for the defendant, and on being asked to find on the different issues, they said that they considered that Bonnell was not a resident of Upper Canada when he got the patent; and they were not altogether agreed on other points, and preferred giving a general verdict.

In Michaelmas Term last, Vankoughnet, Q. C. (William Eccles with him), obtained a rule Nisi for a new trial, on the ground that the verdict was contrary to law and evidence and the judge's charge. They urged that the plaintiff was entitled to a verdict on all the issues; that Bonnell, the patentee, was a British subject, a Canadian by birth, as shewn by his testimony; that the jury had not found that there was any fraud in obtaining the patent, which would render it void; that all they have found was, that Bonnell was not a resident when the patent was obtained, and that such evidence is not required by law, it being quite sufficient that he was a resident when the application for the patent was made, on which point no issue was raised.

Connor, Q. C., shewed cause, and contended that there was no misdirection, or any objection to the judge's charge; that the question as to the residence of Bonnell in Canada at the time of his application for a patent had been left to the jury, though the issue was as to his residence when the patent was obtained; that the evidence shewed clearly that he was not a resident when he made the application, in which case the verdict should not be disturbed; that in the event of a new trial the defendants would be permitted to amend their plea, and the verdict must be for the defendants, and that no benefit could arise from continued litigation.

ROBINSON, C. J.—Undoubtedly the plaintiff was entitled, as well as the defendants, to have a verdict found upon each of the issues, and they were in this case not idle traverses of indisputable facts, but such as it was a right should be disposed of.

We must therefore grant a new trial without costs, we think,

unless the defendants consent that a verdict shall be entered for the plaintiff upon those issues which the learned judge who tried the case may find that he was beyond doubt entitled to succeed upon.

The jury found expressly upon the fifth plea, that at the time of the granting of the patent Bonnell, the patentee, was not resident in this province. That plea might have been demurred to as not raising the proper issue, for the question under the statute is, not as to residence at the time of obtaining the patent, but at the time of making the application for it.

As it was on that plea that the jury were against the plaintiff's right of action, if it did not form in substance a good defence the plaintiff might have moved for judgment non obstante, if he had recovered a verdict upon the other issues, or rather upon the plea of "not guilty." The jury having found wholly against him, he could not move for judgment non obstante; but he suffered nothing from that, except as regards costs, if on the real merits of the case he was not entitled to recover. That calls upon us to consider whether he was or was not such a person as could legally obtain a patent. Was he at the time of his application an inhabitant of Upper Carada? I think the evidence did not shew him to be such, and that the jury determined upon it correctly. They did not think him to be an inhabitant of Canada when he obtained the patent, which was the form in which the issue was taken. Still less was he such, according to his own account (which was given candidly, and I dare say quite correctly), at the time he applied for it.

There would be no use in awarding an interpleader at the plaintiff's instance, when the evidence that is to be given must lead to a verdict against him, if the issue should be put in a proper form.

I will add that it appears to me to be the obvious meaning of the statute, that the inventor must be an inhabitant of Canada, as well as a British subject, when he makes the discovery, which was certainly not the case here. And the parties in this case do not seem to have given attention to those clauses of the statutes 12 Vic. ch. 24, and 14 & 15

Vic. ch. 79, which seem to except from the operation of this statute any new discoveries made in the United States and imported into this country (a). I merely refer to those provisions. We dispose of this rule, as I have already intimated, by discharging it, on the defendants' consenting that a verdict for the plaintiff shall be entered on such issues as the learned judge who tried the case, shall declare were clearly established in his favour; otherwise the rule is made absolute for a new trial without costs.

McLean, J.—The plaintiff was, I think, clearly entitled to a verdict on most, if not all of the issues, as they now stand on the record. The right of the plaintiff, as the assignce of the patent, was not in question, supposing Bonnell entitled to hold it as a British subject, resident at the time of his application for it in Canada. It was evidently intended by the defendants to put such residence in issue, but the plea intended for that purpose in fact puts in issue another immaterial matter—viz., his residence at the time of granting the patent.

The statute 12 Vic. ch. 24, sec. 1, passed 30th of May, 1859, provides that "any person a subject of Her Majesty and resident in this province, having discovered or invented any new and useful art," &c., and desiring to obtain an exclusive property therein, may make application by petition for a patent; and it prescribes the mode of proceeding in order to its being granted by the governor or administrator of the government.

To entitle any person to a patent, and to authorize the government to grant a patent for any useful discovery or invention, it is essential that the applicant must be a subject of Her Majesty and a resident in this province. It is not enough that he should be a subject unless resident, nor will residence alone be sufficient without the qualification as a subject. The fourth plea put in issue the fact of David P. Bonnell being at the time of the granting of the patent a subject of Her Majesty, and his own testimony upon that

⁽a) See 12 Vic. ch. 24, sec. 18—14 & 15 Vic. ch. 79, sec. 11. 4n—VOL, XIII Q.B.

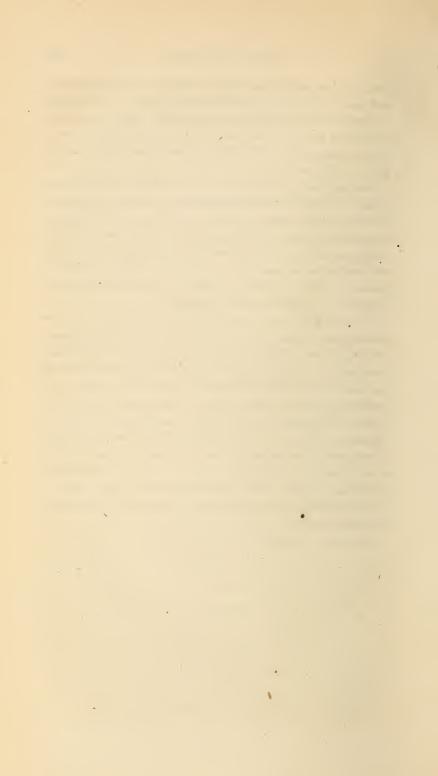
as he always understood, that his parents were of the United States, and came from thence to Canada, and after a residence of ten or twelve years or more returned again to that country. That point does not seem to have been further pressed upon the trial, but Bonnell was particularly interrogated as to his residence in Canada, and proved that from the time of his parents removing from the province he constantly resided in the United States: that he had a family and property there: that he came from thence with the plaintiff, to whom he had previously sold one-third of the interest in the expected patent, in November, 1850, and after remaining a week or ten days in Canada, applied for the patent for his improvement, as a resident or inhabitant of the township of Sandwich; that from the time of his application he remained at Sandwich, at a tavern, till the patent was obtained; and then, after two or three weeks spent at St. Catharines and Dundas, in rather unsuccessful efforts to get his improvement adopted, returned to his residence at Tecumseth, in the State of Michigan, where he had since constantly resided, and where he sold his whole remaining interest in the patent to the plaintiff. All that he could say, beyond a statement of the time he was actually in Canada, not exceeding altogether four or five months, was that he intended, when he came to Canada, to settle in the province and remain for life, if he found encouragement; but not meeting with such encouragement, he returned to the United States. By this statement it appears that the intention to reside depended upon a contingency which did not happen; that there was no such intention unless he found encouragement, and that his stay in the province during the whole period was not as a settled resident inhabitant of the province, but rather as one who might become such if he met with encouragement. The jury, as it appears to me, would have been quite warranted in finding that the alleged residence was colorable, and only continued until its object was accomplished in procuring the patent. Indeed, that seems to me to be the only inference to be drawn from the facts; and it appears to me that it would be absurd to consider a

man who leaves his home and his family in a foreign country and comes into Canada for the express purpose of obtaining a patent, a resident of the province after a week or ten days stay in it; yet this is the utmost extent of residence sworn by the patentee himself to have taken place before he applied for the patent.

Looking then at Bonnell as not entitled to apply for a patent, in consequence of his not being a resident within the meaning of the statute, I think a patent could not legally be granted to him; and being obtained while domiciled in a foreign country, that it cannot confer upon him or his assignee a right to sue under the statute for an infringement of a patent, which by the very terms of the statute he was incapable of applying for or receiving.

If a new trial were now granted in consequence of the fact of residence at the time of application not being found by the jury, we should undoubtedly give to the defendants permission to amend their plea; and upon the admission and testimony of Bonnell there can, I think, be no doubt that another trial would again result in a verdict for the defendants. It appears to me, therefore, that it would only extend litigation, and increase costs between the parties without any corresponding advantage, and that under these circumstances, the verdict should not be set aside—the defendants undertaking to pay to the plaintiff the costs of those issues on which the judge who tried the cause shall certify that he was entitled to succeed.

BURNS, J., concurred.



A DIGEST

ALL THE CASES REPORTED IN THIS VOLUME.

ACCORD AND SATISFACTION.

See Pleading, 1.

Pleading—Accord and satisfaction by agreement.]—Case, for an injury to plaintiff's reversionary interest in land leased by him to defendant. that on, &c., it was agreed between plaintiff and defendant that if defendant would agree to pay the plaintiff the sum of £62 15s, for the use and occupation of certain premises of the plaintiff for one year, the plaintiff would accept such agreement in full satisfaction and discharge of the grievances complained of; that in pursuance of such agreement defendant, on &c., agreed to pay the plaintiff the said sum of £62 15s., and plaintiff then accepted the said agreement in such full satisfaction and discharge as aforesaid; Held, a good plea of accord and satisfaction. Clark v. Ring. 185.

ACCOUNT STATED.

Evidence. —A claim upon an account stated cannot be supported by a note which was not due at the commencement of the suit, and the defence is available under the general issue. Hill v. Lott, 465.

ACTION.

See AUCTION.—COMMON COUNTS.-CONTRACT, 3.—GREATWESTERN R. TENANCE—MANDAMUS, 2.—Post-MASTER—RAILWAY COMPANIES. 1, 2, 3, 7.—Registry Books.— SHERIFF, 2.

An agreement was made between the plaintiff of the one part, and the " President of the Port Burwell Harbour Company, on behalf of the said President, Directors, and Company of Port Burwell Harbour," of the other part, and under the seal of defendant and plaintiff; Held, that the plaintiff was entitled to sue in his own name. Saxton v. Ridley, 522.

AGENT. See CRIMINAL LAW, 2.

AGREEMENT.

See Action.—Common Counts.— CONTRACT.—DAMAGES, 2.—DEED. -EVIDENCE, 5.—Nolle Prosequi. -Notice to Quit.-Promissory Notes, 8.

Agreement — Construction of— Work to be commenced "so soon after the opening of navigation this spring as, &c.—Pleading.] — Declaration upon an agreement, by which defendant undertook to commence certain work "so soon after the opening of navigation this spring as he can remove a steam dredge and working apparatus to Port Burwell." Held insufficient to allege only that the W. Co., 2.—MAGISTRATES—MAIN- spring had elapsed; but that it was

necessary to aver that since the opening of the navigation the defendant could have removed the dredge. The work was to be done at such places as should be pointed out by the plaintiff. Semble, that it should have been averred that he did point out such places, or asked defendant to go with him for that purpose, and was refused, not merely that he was ready and willing to point out. Saxton v. Ridley, 522.

AMENDMENT. See Dower, 1.

Promissory note declared on as a bill of exchange - Amendment -Special finding.]—Plaintiff declared against the defendant as maker of a note, and the instrument produced at the trial was a bill of exchange drawn by defendant, and endorsed to the plaintiff; an amendment was applied for, and a special finding directed, on which the plaintiff applied to enter judgment in his favor. The application was refused, as such an amendment could not properly have been allowed under the statute. Vizard v. Gilchrist, 605.

APPEAL

See Bond.—Foreign Judgment, 1.

Where nothing but costs are involved, this court will not reverse the decision of the court below on a mere point of special demurrer. al. v. Elliott et al., 367.

ARBITRATION AND AWARD. See Mandamus, 2.—Railway Com-PANIES, 1, 2, 7.

Great Western R. W. Co.—Arbitration.—Rights allowed for not withExtravagance of sum awarded.]— The deed of submission recited in the award stated that the Company "had set out and taken for the uses of the road a portion of M.'s land, being all hislandlying immediately north of the land theretofore conveyed by him to the Company;" and the award determined "that the value of the lands so set out and taken as aforesaid is," &c. Held, that the land to be taken by the Company was sufficiently described. The award, however, was set aside: 1. Because the arbitrators, in valuing the land, which bordered on the water, allowed a large sum for the water frontage, to which the owner had no legal or equitable right, but merely a supposed claim upon the favorable consideration of the government to grant it to him. 2. Because the award did not transfer any such claim to the Company, if the arbitrators could legally have allowed for it. Quære, whether the sum awarded was not so extravagant as in itself to vitiate the award. Quære, also, whether after an award has been made the Company can relinguish the land valued, and claim exemption from compliance with it. In re Miller and the Great Western Railway Company, 582.

ARREST.

See Malicious Arrest,

Arrest—Bail to the Sheriff—16 Vic. ch. 175, secs. 7, 8—Construction of— 10 & 11 Vic., ch. 15.]—The sheriff cannot of his own mere motion allow a prisoner charged in execution, and in his custody, the benefit of the limits. A debtor who is admitted to the limits on giving a bond to the sheriff, under 16 Vic., ch. 175, is bound to enter into and file the recognizance required by 10 & 11 Vic., ch. 15, within a month from the execution of such bond. If he does not, the sheriff in 1 the submission—Uncertainty— | must recommit him to close custody at the expiration of the month, or he will be liable as for an escape. If the certificate of the filing such recognizance, &c., be not delivered to the sheriff within a month, the bond to him is forfeited. Semble, that it is obligatory on the sheriff to take a bond under 16 Vic., if the sureties are sufficient. Calcutt v. Ruttan. 220.

ASSESSMENT OF DAMAGES. See BOND.—DAMAGES, 3.—PRACTICE.

ASSIGNMENT.

See RENT.

In trust for creditors.]—See "Possession."

ASSURANCE.

See Insurance.

ATTACHMENT.

See Foreign Judgment, 1.—Trover.

ATTORNEY.

See New Trial, 6.—Set off.

Action against attorneys for not taking confession—Plea of composition by plaintiffs with the debtor-Statement of retainer and damage— Pleading. — Case against the defendants, as attorneys employed by the plaintiffs, for not taking a confession of judgment from one L., their debtor. Plea, that after the retainer, and before the alleged default of the defendants, and before the commencement of this suit, the plaintiffs, without the consent or concurrence of the defendants, together with other creditors, made an arrangement with L., by which he assigned all his effects to B., one of the plaintiffs, and another person, to be disposed of and the proceeds applied in paying such creditors as should concur in this arrangement.

Held, on demurrer, plea good. Held, also, that in the declaration (set out below) the retainer of defendants as attorneys, and the damage sustained by the defendants were sufficiently stated. Benner et al. v. Burton et al., 387.

AUCTION.

Sale on credit not expired—Action brought on common counts.]—Defendant purchased goods at auction, on the following terms,—"Under £210s. cash down; over that amount, but under £125, eleven months' credit on improved endorsed notes with interest." Held, (confirming Wakefield v. Gorrie, 5 U.C. R. 159) that an action would not lie upon the common counts until the time of credit had expired. Silliman v. McLean, 544.

BAIL.

See ARREST.—PRACTICE.

BILLS OF EXCHANGE.

See AMENDMENT.

BOND.

See ARREST.

Debt on annuity bond by executor— Pleas, payment and set off-Replication—Necessity for assigning breaches -Error-Right to take exceptions of which notice not given. To debt by executor on an annuity bond made by defendant to the testator, and payable during the lifetime of testator, defendantpleaded-2ndly, that before the commencement of this suit, to wit, on the 1st of November, he paid to the testator all and every the sums of money which before then were due, &c. To this plea, plaintiff replied that defendant did not pay to testator all sums of money at any time before the com-

mencement of this suit due, &c., by virtue of, &c. Defendant pleaded— 3rdly, that before the commencement of this suit he owed plaintiff upon the said writing obligatory £35, and that the testator at the time of his decease was, and plaintiff since the death of testator still is, indebted to defendant in £100, for use and occupation, &c., which he offered to set off against the said debt due by him to plaintiff under said writing obligatory. Plaintiff replied to this plea that he was not nor is indebted modo et formâ. Issue was joined on these pleas. No breach was alleged in the declaration, nor assigned in the replication, nor suggested under the statute 8 & 9 Wm. III. ch. 11, sec. 8; nor was there an award of venire to assess damages. jury found for the plaintiff, and assessed the damages generally. On error, assigning for errors that the replication to 2nd plea tendered an issue beyond the plea; that there should have been an assignment of breaches or a suggestion under the statute; that there was no issue on which judgment could be given, and therefore there should be a repleader; that the replication to the plea of set off only denied that the plaintiff was indebted, not that testator was, and that this was not cured by verdict—*Held*, that the issues tendered by the replication were sufficient, and that the allegations in the pleadings were sufficient to warrant the assessment of damages. whether, on the argument, exceptions can be taken, of which no notice has been given. Smith v. Muirhead, Executor, &c., 1.

BREACHES.

Assignment or suggestion of]—See "Bond."

BY-LAW.

See Common Schools, 1, 3.—Muni-CIPAL CORPORATIONS.

Intendment in favor of—Township levying money for county purposes.] -1. A township by-law was quashed as to so much of it as related to the raising a sum of money to defray the demands of the county council on the township, and as an equivalent to the government school grant, &c., it not appearing on the face of it that it was directed to the purpose of meeting a deficiency, nor even that there was any, if that would have authorized the by-law. Semble, however, that a township council has not power to pass a by-law imposing a rate in aid of any county rate. It does not appear necessary thata township by-law should set forth the estimates on which it is founded; and the court will intend that proper estimates have been made in the absence of evidence that they are wanting; nor that the by-law should state that the rates are calculated at so much in the pound on the actual value; and in the absence of anything to the contrary the court will intend that the council has followed the directions of the statute. Fletcher v. Municipality of the Township of Euphrasia; and White v. The Municipality of Collingwood, 129.

Rules for construction of—Certainty.]—2. In constructing a by-law, the court will not intend that the municipality are trying to evade compliance with a statute, but will give every reasonable help of construction to bring the by-law within it. They will also look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give full effect to the whole. Where a by-law recited that the amount of the whole ratable property of the township, according to the last assessment returns, was

£114,756, and that it would require the annual rate of 21d. in the pound, as a special rate, for payment, &c., and then enacted that a special rate of 2½d. should be levied to pay the principal and interest of the loan to be raised under the by-law, and that the proceeds of such special rate should be applied solely to the payment, &c., until the same be fully paid and satisfied; *Held*, that the recital as to the amount of ratable property and the assessment returns was sufficient, and that it sufficiently appeared that the rate was to be levied in each year. In one part of the by-law the reeve was empowered to issue debentures for such sums as should be from time to time required for the purposes mentioned, but not to exceed in the whole £10,000; in subsequent clauses a special rate was imposed to pay "the said sum of £10,000," and the application of "the said sum of £10,000," was pointed out; and the debentures were directed to be made payable "within twenty years of the time that this by-law shall come into operation." Held, that the amount of the loan, and the time when the debentures were to be made payable, was stated with sufficient certainty. In re Cameron and The Municipality of East Nissouri. 190.

Establishing a road—Insufficient description—Discretion in quashing by-laws.]-3. The statute does not make it strictly imperative upon the court to quash defective by-laws; and in this case—where the road established by the by-law was not sufficiently described, but it appeared that it was clearly defined and marked by fences on each side, and had been travelled for eight years—they refused to inter-Hodgson v. The Municipal Council of York and Peel, and The Municipal Council of Ontario, 268.

Creating loans—Publication—Al-4 o-vol. XIII, Q.B.

teration before passing—12 Vic. ch. 81, sec. 177. —4. The Municipality of Kingston proposed to take £7500 in a road company, and published a by-law (No. 6) to authorize a loan for that sum, containing the usual recitals, imposing a rate, and directing the issue of debentures, &c. When the by-law came on for discussion a clause was added reducing the sum to £5000, and directing the rates to be altered accordingly, but the other provisions to remain the same; and it passed thus amended in June, 1854. December following another by-law was passed (No. 8,) providing for the issuing of debentures authorized by No. 6, and directing a rate to be levied for the payment of the interest thereon, but making distinct provisions for meeting the principal out of the profits of the stock to be taken, and from other funds. This by-law did not repeal No. 6, but the enactments in it shewed clearly that the rates imposed by that by-law were meant to be dispensed with. Held, that this last bylaw was bad, for it must be considered as a new and independent by-law, and not as a mere supplement to No. 6; and it should therefore have been published before passing, and have contained the usual recitals and enactments required in by-lawsfor creating By-law No. 6 was also bad, though not moved against, for it was not published beforehand in the form in which it ultimately passed. In re Bryant and The Municipality of Pittsburg, 347.

Form of rule nisi to quash—Insufficient rate.]—5. A rule Nisi to quash a by-law, obtained near the end of term, was made returnable eight days after service: the defendants appeared, and objected that the rule should have been to shew cause on a day certain. Held, that this objection, if fatal, was waived by the appear-The by-law in this case was

clearly bad, the rate directed to be levied in the first year being insufficient. Perry v. The Town Council of the Town of Whitby, 564.

CARRIER.

See Wharfinger and Warehouseman.

Steamboat owner—Liability for goods-Limited Partnership Act, 12 Vic., ch. 75.]—A box was put on board the defendant's steamer, some of the men employed on the steamer assisting warry it on board. It was not delivered to any officer of the boat, but as the steamer was starting, a bill of lading for it was handed to the purser. No receipt was given, but it was shewn that this was not customary until the return of the steamer. The bill of lading was handed by the purser to the wharfinger at Port Credit, and on the return trip was handed back to him, with the information that the box had not been delivered there. Held, that the defendant was liable; for the bill of lading was notice that the shipper considered the box as being on board, and it should have been ascertained how the fact was before landing at Port Credit. The defendant was described in the declaration as the general partner of the firm of D. B. & Co., and evidence was given that the steamer was understood to be owned by D. B. Held, sufficient to charge defendant, there being no plea in abatement. Howland v. Bethune, 270.

CHATTEL MORTGAGE.

Chattel mortgage—Place of registry—Proof of mortgagor's residence.]
—The description of the mortgagor in a chattel mortgage is at most only prima facie evidence of his residence; and held, that in this case, (upon the evidence stated below,) the jury were

warranted in finding that he had changed his residence to the county in which the mortgage was registered, notwithstanding that he had left his family behind him in the county as of which he was described. *Mellish* v. *VanNorman*, 451.

COMMISSION TO EXAMINE WITNESSES.

An affidavit of the due taking of evidence, under a commission to examine a witness abroad, was entitled in the Common Pleas, instead of the Queen's Bench. *Held*, no objection. *Comstock* v. *Burrowes*, 439.

COMMON COUNTS.

See Auction.

Sealed agreement—Right to sue on common counts.]—Where the plaintiff entered into a contract under seal to deliver timber of certain specified dimensions, and the timber delivered fell short of the size, but was accepted and used: Held, that he might recover on the common counts. White v. Manning, 640.

COMMON SCHOOLS.

See LIBEL.—MUNICIPAL CORPORA-TIONS, 2.

13 d 14 Vic. ch. 48, sec. 18, subsec. 4—By-law uniting school sections.]—1. A school section in a township cannot be altered by the municipality without the request of the majority of the freeholders and householders in each section affected, expressed at a meeting called by the trustees for that purpose; and the want of such meeting and request is a sufficient ground for quashing the by-law,—but see note (a) at the end of this case. In re Morrison and the Municipality of the Township of Arthur, 179.

Replevin-Cognizance under trus-

tee's warrant to collect school rates-Demurrer—Form of warrant—13 & 14 Vic., ch. 48, sec. 12.]—2. Under 13 & 14 Vic. ch. 48, school trustees can only give a warrant to collect school rates within the limits of the section for which they are appointed. Semble, that such warrant is sufficient if signed by two of the trustees, and that it need not be under their corporate seal. making cognizance under such warrant it is sufficient to state that the plaintiff was duly assessed, and that the collector (the cognizor) was duly appointed; itisnot necessary to state that the rate was decided upon at a meeting, as required by the statute, or how the appointment was made. Gillies v. Wood, 357.

13 & 14 Vic. ch. 48, sec. 18, sub-sec. 4-16 Vic. ch. 185, sec. 16-Alteration of school section—Request of freeholders, when necessary.]—3. Held, (Draper, J., dissenting,) that the request of the freeholders and householders mentioned in 13 & 14 Vic. ch. 48, sec. 18, sub-sec. 4, applies only to the union of two or more sections into one; and that the municipality of a township may pass a by-law to bring back exclusively within their own jurisdiction any part which has been united with a school section in another township, and may alter and arrange the sections within their own township; provided only that all parties affected by such intended alteration shall appear to have been duly notified. By a resolution of the District Council in 1849, a union school section was formed, consisting of part of what had formerly been section ten in Saltfleet and part of section three in Barton. In 1854 a by-law was passed by the Municipality of Saltfleet, which defined the limits of section ten, and brought it entirely within Saltfleet, excluding that part of Barton which had belonged to it. *Held*, that a ratepayer of Barton could not object that

no notice had been given to those affected in Saltfleet; and semble, per Robinson, C. J., that no notice was required to those in Barton. It is not necessary to recite in such by-law that the requisite notice, &c., has been given. In the matter of Ness and the Municipality of the Township of Saltfleet, 508.

Alteration of school sections within a township and of union school sections.]—4. Under 13 & 14 Vic., ch. 48, sec. 18, sub-sec. 4, the municipality may alter the boundaries of school sections within their townships, by taking from one and adding to another, without any previous request of the freeholders or householders, and notwithstanding their disapprobation of the change, provided that those affected by the alteration have notice of the intention to make it. But they have no power to alter the boundaries of a union school section consisting of parts of different townships. In the matter of Ley and the Municipality of the Township of Clarke, 433.

COMPUTATION.

Of amount due when several payments made.]—See "Interest."

CONCESSION.

See Survey.

CONDITION.

Deed — Sheriff's sale.] — Where lands were held by A. upon express condition to alienate only to his children; and under an execution against him the sheriff sold and conveyed his interest by a deed sufficient to pass the fee—Held, not a breach of the condition. Reaume et al. v. Guichard, 275.

CONTRACT.

See AGREEMENT.

Measure of damages on contract to deliver cordwood.]—See 'Damages,' 2,

Contract for sale of flour f. o. b. -Liability of vendee for warehouse charges.]-1. One E. in February, sold defendant certain flour to be delivered in May following, f. o. b. (meaning free on board the vessels which were to take it from Hamilton.) The flour was delivered in May, but defendant had no vessels then ready, and E. stored it with the plaintiff, subject to defendant's orders, paying all charges on it up to the end of May. Held, that defendant was liable to the plaintiff for subsequent warehouse charges up to the time of shipment. Howland v. Brown, 199.

Building agreement, construction of—Liability—Destruction by fire.]— 2. In an action for work and labour against A. and B. the plaintiff put in an agreement headed "An estimate for the carpenter and joiner work of a brick cottage, to be done for Mr. William Walker" (defendant's father.) Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were indorsed, signed by the plaintiff, but not saving from whom the money was received. plaintiff was to find materials, and no time was mentioned for completion of the work. Held that parol evidence was admissible to shew that defendants were liable on the contract. also, that the destruction of the building by fire before the completion of the plaintiff's work could not defeat his claim for what he had already done. Hubbard v. Walker et al., 205.

Agreement—Incorporated company—Liability.]—3. Assumpsit for work and labor. The plaintiff put in a paper headed "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Company" of &c., of the first part, and James Johnson, (the plaintiff,) of &c. It contained an agreement by the plaintiff to do certain

work for specified prices, which "the party of the first part hereby agree to pay," &c., and was signed by the defendant, describing himself as "Pres. V.B." and by the plaintiff. It appeared that the Victoria Bridge Company had been duly incorporated, and that the plaintiff had received £350 from them on account of this work. Held, that the defendant was not personally liable upon this agreement. Johnson v. Hamilton, 211.

CONVEYANCE.
See Deed.

CONVICTION.
See Criminal Law.

CORONER'S INQUEST.

Allowance to medical witness—13 & 14 Vic., ch. 56, sec. 7.]—A medical witness, in obedience to the coroner's summons, attended during two inquests held on fifty-two persons killed by a railway accident, and occupying several days; no post mortem examinations were made. Held, that under the statute he could be allowed only 25s. for each day's attendance, (not for each body,) together with his mileage in travelling. In re Askin and Charteris, 498.

CORPORATIONS.

See Action—Contract, 3.—Limitation of actions—Notice of Action.

COSTS.

See Appeal—Coroner's Inquest.

Contested election—Costs.]—Held, that under 16 Vic., ch. 181, sec. 27, the judge deciding a contested election has a discretion to withhold costs altogether from either side, if he should think fit. Draper, J., dissenting. Regina ex rel. Swan v. Rowat, 340.

COUNTY COUNCIL. See REGISTRY BOOKS.

CRIMINAL LAW.

1. Having connection with a woman under circumstances which induce her to believe that it is her husband, does not amount to a rape. Regina v. Francis, 116.

Indictment for converting note intrusted to prisoner for special purpose -Evidence for Conversion-"Agent" 4 & 5 Vic. ch. 25. sec. 41.]—2. The prisoner was convicted upon an indictment under 4 & 5 Vic. ch. 25, sec. 41, charging that one W. intrusted to him for a special purpose—viz., for the purpose of exhibiting to B. and obtaining another note made by prisoner to and endorsed by B., the said prisoner then being the agent of W., —a promissory note made by prisoner payable to and endorsed by B., being a valuable security, without any authority to sell, transfer, &c., or convert the same to his own use; and that, in violation of good faith, and contrary to the purpose for which such note was intrusted to him, he unlawfully kept and converted it to his own use. appeared that the prisoner gave an endorsed note, payable at Kingston, in payment of goods purchased, with an agreement that in case the payee should be unable to get it discounted at Kingston he would procure for him a new note, with the same endorsers, payable at Belleville. The payee being unable to get a discount at Kingston, sent the note to W. at Belleville with instructions to get a new note from the prisoner as agreed on; W. intrusted the prisoner with the note, on his promise that he would take it to the indorsers, and either return it or bring back a new note at once. The prisoner however kept the note, and neither returned it nor procured another, though often requested to do so both by the payee and W. Held, that the prisoner was not an agent within the meaning of the statute, and that the conviction must be quashed. Semble, also, that it could not be said that the prisoner was intrusted with the note without any authority to transfer or pledge the same; or that his retaining it was proof of converting it to his own use. Regina v. Hynes, 194.

Indictment — Perjury — Division Court—Interpleaderissue—New trial —13 & 14 Vic. ch. 53, sec. 102.]—3. The clerk of a division court, acting under 13 & 14 Vic. ch. 53, sec. 102, issued an interpleader summons of his own authority, without the bailiff's request. Both parties attended before a barrister appointed by the judge of the court, who was ill, and an order The judge afterwards was made. ordered a new trial, which took place. The defendant was convicted for perjury committed upon that occasion. Held, that both parties having appeared, the proceedings in the first instance could not be considered void for want of a previous application by the bailiff; but held also, that it was not competent for the judge to order such new trial, the first order being made final by the statute; and that the conviction was therefore illegal. Regina v. Doty, 398.

Sacrilege—4 & 5 Vic. ch. 25. sec. 13; ch. 24, sec. 43—18 Vic. ch. 92.]—4. An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishioners of the said church," Held bad.—They must be averred to belong to some person or persons individually. Such a defect is not within the 18 Vic. ch. 92, secs 25 and 26. Regins v. O'Brien, 436.

5. On an indictment for forcible

entry and detainer of land, evidence of title in the defendant is not admissible. Regina v. Cokeley et al. 521.

CROWN GRANT.

See ESTATE.

DAMAGES.

See EJECTMENT.

Trespass for taking goods—Measure of damages.]—1. In an ordinary action of trespass for taking goods the measure of damages is the value of the goods when taken (which the jury may estimate liberally), and interest. It is only in a very peculiar case that such value can be exceeded, and the excess claimed must be stated as special damage. Maxwell v. Crann, 253.

Breach of Contract-Measure of damages. —2. Assumpsit for breach of contract to deliver cordwood. appeared that the wood was required for the purpose of burning bricks. The plaintiff proposed to prove that during the delay occasioned by the defendant's neglect to deliver the price of bricks fell considerably, and he claimed to recover for this loss. Held, that such evidence was rightly rejected, and that the proper measure of damages was only the difference between the price specified in the contract and that actually paid for the wood procured by the plaintiff elsewhere, together with compensation for his trouble. Feehan v. Hallinan, 440.

Assessment of damages — Allowance for future injury.]—3. At an assessment of damages the plaintiff's evidence went exclusively to shew injury caused by the giving way of dams and embankments, alleged to have been wrongfully and unskilfully put up by defendants. About two acres of land were washed away, which his witnesses valued at from

£20 to £30 an acre. They also swore that the whole estate was further damnified, and one said to the extent of £50, which he stated was for the probability of future injury; others, however, valued the damage at a far greater sum. The jury having assessed the damages at £100, held, that the court could not assume that any part of this was for future damages, the judge having told the jury not to allow for that; and they therefore refused to interfere. Young v. The Grand River Navigation Co., 506.

DEATH.

Of plaintiff before return of rule nisi for new trial.]—See "New Trial," 4.

DEBTOR.

See ARREST.

DEED.

See Condition — Estate — Evidence, 2—Presumption—Secondary Evidence.

Sale of land—What constitutes a specialty—Promise to "deliver conveyance"—Purchase money falling due on Sunday.]—Where a seal is set opposite to the name of the party signing, the document must be treated as under seal, although the testatum is, "I hereby subscribe myself." A promise to deliver a conveyance includes a promise to execute it. Where the day on which money is due under an agreement falls on Sunday, semble, that the payment must be made on Saturday. Whittier v. M'Lennan, 638.

DETINUE.

Detinue—Goods seized in defendant's hands before trial, on execution against plaintiff, and redeemed for plaintiff — Action pressed notwith-

standing - Order thereupon.]-Detinue for a watch and chain. At the trial it appeared that the defendant had obtained possession of the things by redeeming them, at the plaintiff's request, from a person with whom they were pledged, and that he had refused to give them up on payment of the money so advanced, claiming to retain them for a further sum due him by the plaintiff for board. A verdict having been found for the full value of the articles. it was shewn on application, by affidavits, that before the trial the defendant had obtained execution against the plaintiff for this sum in the Division Court, under which the bailiff, by the plaintiff's directions, had seized this watch and chain in the defendant's possession; and that to prevent their being sold, the plaintiff had procured some one to advance the money on being allowed to retain them as security. Held, that under such circumstances this action should not have been proceeded with; and ordered that there should be a new trial without costs, unless the plaintiff would reduce his verdict to nominal damages; and that he should in either case pay the costs of this application. Johnson v. Lamb, 508.

> DEVISE. See WILL.

DIVISION COURT. See Criminal Law, 3.—Trover.

DOUBLE-FRONTCONCESSION. See Survey.

DOWER.

action was directed to the tenant as tenant of lot No. 3, (the right lot,) but in the body of the demand, and in the declaration on the record, the premises were described as lot 2: a description was however given by metes and bounds, both in the demand and in the declaration, which shewed plainly what lot was intended. The plea denied the husband's seisin of said lot No. 2. The tenant at the trial, though he opposed an amendment, admitted that he had not been misled by the mistake. The learned Judge allowed the amendment. Held, that he had authority to do so. It was proved that the tenant held under conveyance made to the husband, and by the husband to another party. He admitted that he had both these deeds in his possession, and declined to produce them on notice. Held, ample evidence of seisin. Matheson v. Malloch, 354.

Plea of non-tenure — Mortgage by husband—Election.]—2. Dower—Plea, non-tenure. It appeared that the husband before his death had executed a mortgage in fee of the premises, which was still unpaid; the tenant, who was not shewn to be in possession, claimed under a purchase at sheriff's sale, upon execution against the husband's land. Held, (affirming Cumming v. Alguire, 12 U. C. R. 330,) that defendant could not recover against him. Held also, that a plea of election by the demandant to take under her husband's will was not sustained upon the evidence set out below. Charles Pulker and Harriett Holmes Pulker, his wife, formerly the wife of John Ellis, v. Evans, 546.

Release by demandant without second husband.]-3. Dower. Pleas: 1, Never seized; 2, Never married; Amendment in number of lot 3, Non-tenure; 4, Payment in satclaimed—Proof of seisin.]—1. In isfaction of dower; 5, A release by dower the demand served before demandant to one W., through whom

the tenant claims. At the trial it appeared that demandant's first husband conveyed the land in question, with otherland, to W. as trustee, to transfer it to M, the husband's brother. After the husband's death the brother allotted this land to demandant, and she, being married a second time to one McGill, sold it to the defendant, who paid her the purchase money, and received a conveyance from W., executed at demandant's request. release was produced, executed by demandant, describing herself Bridget McGill, late widow of M. her first husband, to W., of all her dower "to the within mentioned land," dated the same day as the first husband's deed to him, but it was not shewn that this release had been annexed to or endorsed on any other deed. Held, (affirming Howard v. Wilson, 10 U. C. R. 186,) that on these pleadings demandant must succeed, notwithstanding the apparent injustice of the case; for the release was void, because the second husband did not join in it. McGill v. Squire, 550.

EJECTMENT.

See Estoppel, 1, 3.—Evidence, 5.
—Overholding Tenant,

14 & 15 Vic., ch. 114, sec. 12, construction of - Double value -Mesne profits — Pleading.] — 1. First count, debt on the statute for double value, claiming £40; second count, for use and occupation, claiming £20. The defendant pleaded, secondly, that after the passing of 14 & 15 Vic. ch. 114, the plaintiff impleaded the defendant in an action of ejectment for the same premises in the declaration mentioned, &c., in which action the jury were sworn as well to try the issue joined as to assess the damages to which the plaintiff might be entitled for the use and occu-

pation of said premises, and a verdict was rendered for the plaintiff, as and for damages for the use and occupation of said premises, &c.; thirdly, to the whole declaration, as to £20, parcel, &c., the same plea. Held, on demurrer, both pleas bad, as being no answer to the first count, and for not shewing that notice of claim to substantial damages was given, or that judgment had been entered, or that the recovery was for the same claim; that the third plea was bad also, for not shewing to what £20 it was pleaded. Hamer v. Laing, 233.

2. Semble, per Burns, J., that a plaintiff in ejectment not having proceeded for substantial damages, is precluded from recovering them in a

subsequent action. Ib.

ELECTION.

· See Dower, 1.

ELECTIONS (MUNICIPAL). See Costs.—Quo Warranto.

ESTATE.

See Condition.-Estoppel, 1.-Will.

Crown grant, construction of.]—The land in question was granted by letters patent to Anne Goldie, her heirs and assigns, for ever, "to have and to hold the said parcel or tract of land thereby given and granted to her the said Anne Goldie, in trust for herself and her children, Martha Goldie and Francis Goldie." Held, that Anne took the fee, and that no legal estate passed to the children. Goldie v. Taylor, 603.

ESTOPPEL.

See EJECTMENT. — EVIDENCE, 3. — PLEADING, 7.—PROMISSORY NOTES, 2.

Ejectment—Assignment of agreement for lease—Effect of lease after-

wards procured by lessor. -1. Eject-| rent. -3. The defendant rented the The plaintiff claimed under a lease to himself from the City of Toronto, dated 1st January, 1854. The defendant produced a deed poll, executed by the plaintiff, dated 3rd January, 1848, assigning to the defendant and another all his right to the land in question, to hold to them, as joint tenants, during the time of the lease to be obtained for the same, and authorizing them to demand and receive a lease from the city on the same terms as agreed upon to be granted to himself. At the time this assignment was made the plaintiff held only an agreement for the lease, which lease, notwithstanding the assignment, he had afterwards procured in his own name: *Held*, that the plaintiff was not precluded by the assignment from setting up the lease, and therefore that he was entitled to recover. Parkinson v. Clendinning, 150.

Case for fulse return—Estoppel— Acceptance of return by plaintiff.] 2. A Fi. Fa. at the suit of one G. against R. was placed in the sheriff's hands, with instructions not to enforce it until further orders, unless other executions should come in. ther instructions were received, and the plaintiff subsequently put in an execution against R. with directions to proceed at once. The sheriff levied on both writs, and paid over the money to G., who had indemnified The plaintiff then obtained a return to his writ of nulla bona, which the sheriff said was the only return he would make, and sued out a Ca. Sa., on which R. was arrested. Held, that the plaintiff, by taking such return, had not precluded himself from proceeding against the sheriff, and that he could maintain an action on the case for a false return. Aiken v. Moody, Sheriff, 169.

land in question from P. for five years, but paid all the rent to A., except for the last year and a half, which he paid to B. The first of the payments to B. was made with A.'s assent. plaintiff, claiming under a deed from A., made after this payment, brought ejectment. Held, that the payments so made to B. formed no defence to this action. Pomeroy v. Dennison, 283.

4. Case for false return of nulla bona to a Fi. Fa.,—Plea, that the plaintiff accepted such return, knowing it to be untrue, and issued a Fi. Fa. lands upon it. Held, no defence. Markle v. Thomas, 363.

EVIDENCE.

See ACCOUNT STATED.—CARRIER.— CHATTEL MORTGAGE, -- CONTRACT, 2.—Criminal Law, 2, 5.—For-EIGN JUDGMENT, 2.—MALICIOUS ARREST.—MEDICAL EVIDENCE.— Nolle Prosequi.—Possession.— REPLEVIN, 1, 3.—SECONDARY EVI-DENCE. -TROVER.

Goods furnished for vessel—Evidence of ownership. \—1. Assumpsit for goods furnished for a vessel. The defendant was called as a witness, and proved that he had subscribed £50 towards a line of freight vessels from Toronto to Quebec, and that he had never had anything to do with this boat, or with the plaintiff with respect to her; but being sued for and obliged to pay some demands on her account, he had assigned what interest he had. It appeared, too, that the vessel was Held, not sufficient eviregistered. dence of ownership to charge the defendant. Maitland v. Harris, 118.

Pleading — Release delivered as escrow—Onus probandi.]—2. To an action for work and labour, the defendants pleaded a release by agreement Ejectment—Estoppel—Payment of under seal, making profert.

plaintiff replied that the agreement was delivered to a third party as an escrow, on condition that it should be void on default made by the defendant in payment of £200 by a certain day; that the defendant did not pay, whereby the agreement became void, and so was not the plaintiff's deed. Held, that the defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery as part of his case Light v. Woodstock and Lake Erie Railway and Harbour Company, 216.

Letters written "without prejudice"-Improper reception of evidence not ground for new trial, where other sufficient evidence. -3. In an action of trespass for an assault the act was proved, but there was no evidence to identify the defendant as the person who committed it. To supply this, letters were put in, which had passed between the attorneys on either side with a view to a settlement, the first of which was written expressly "without prejudice." The plaintiff's attorney, who produced the letters, also swore that the defendant had called on him, and admitted that it was he who struck the plaintiff. The jury found for the plaintiff. Semble, that the letters should not have been received, even for the purpose of proving the identity; but as the other testimony was sufficient to warrant the verdict, the court refused to interfere. Burns v. Kerr, 468.

Discount — Payment by check — Whether accepted in satisfaction or not—Evidence.]—4. Defendant, the drawer of a bill, applied to a broker to get it discounted for him. The broker had not money at the moment, but expected to have it during the day from the proceeds of a bill maturing, which belonged to the plaintiff. The | See CONDITION .- FI. FA .- MANDAplaintiff being applied to by the

broker, agreed to take the defendant's bill. The bill coming due, was not paid in money, but the broker was offered a check of one of the parties to it, which he refused to receive unless marked "good;" and the bank was then closed for the day. broker then said he would take the check if the defendant would accept it in discount of his bill; and the defendant, being applied to, took the check and handed the bill to the plaintiff; and as it was for a larger sum than the bill, he paid the difference to the giver of the check: he also paid the broker's charges. The check was dishonoured; and the plaintiff having sued the defendant upon his bill, the learned Chief Justice directed the jury that the question for them to decide was, whether the defendant accepted the check as absolute payment or not; and that if they believed the broker's account (as given above, contradictory evidence having been also adduced,) they should find for the plaintiff. Held, that the direction was right, and that the evidence warranted a verdict in the plaintiff's favor. Geolegan v. Lawson, 495.

Ejectment — Production of writing.]—5. Ejectment. One of the plaintiff's witnesses proved that the defendant took possession of the land under a verbal agreement with the plaintiff to purchase it from him; and on cross-examination, the same witness swore that several days afterwards he heard the plaintiff say that there was some writing between him and the defendant. Held, not sufficient evidence of the existence of a written agreement to render its production by the plaintiff necessary. Taggart v. Ross, 611.

EXECUTION.

MUS, 2.

EXECUTOR,

See PAYMENT, 2.—WILL.

FALSE PLEA.

See Promissory Notes, 1.

FIERI FACIAS.

See ESTOPPEL, 2, 4.—FIXTURES.

What time may clapse between issuing and return of.]—1. A Fi. Fa. against goods may be made returnable with an interval of several terms. In this case it was issued on the 18th of July, 1854, returnable on the 1st of Trinity Term, 1855. Foster et al. v. Smith, 243.

2. A Fi. Fa. placed in the sheriff's hands with instructions not to sell until another writ comes in, is not in his hands to be executed, and will not bind the goods, either against a subsequent execution or a bond fide purchaser for value. Ib.

FIRE.

See FIXTURES.

Accidental.—Effect of, on claim for work already done.]—See "Contract," 2.

Sale of, while execution in sheriff's hands against vendor—Effect of severance by vendee—Statute of Frauds. —Trespass against the sheriff for seizure under a Fi. Fa. The goods in question, an engine and boiler, had been in a saw-mill which was burnt down, and remained there, set in brick and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them verbally to the plaintiffs, who detached them from the mill and removed them to another place, where the sheriff followed and sold under a Ven. Ex. Held, that the first attempt at sale was clearly illegal, as the goods were then fixed to the freehold and could not be taken as chattels. Quære, whether the verbal sale was effectual, or whether the Statute of Frauds would apply.—Semble, that it would not, but that the sale would, in effect, amount only to a license to the vendee to enter on the land and detach the goods; and Quære, whether on being so severed, the Fi. Fa. would not attach upon them. Walton et el. v. Jarvis, 616.

FOREIGN JUDGMENT.

Assumpsit on foreign judgment-Jurisdiction of foreign court—Judgment contrary to natural justice-Relation of writ of attachment-Color — Pleading — Demurrer.]—1. Respondents obtained verdict against appellants in a foreign court in the United States, in trespass de bonis asportatis, and sued on such judgment, in assumpsit in this country. The alleged trespass was committed in this country by Kingsmill, one of the defendants below, in his capacity of sheriff, and in execution of a writ of attachment sued out against one T., an absconding debtor. The eighth plea set out that defendant Kingsmill was such sheriff, &c., the warrant of attachment under which, &c., that plaintiffs below claimed, &c., by virtue of a sale made to them after issuing and delivery of said writ, &c. Averment, that at the time of attaching and seizing, &c., the property was by the law of Canada in said T., and subject to the said attachment; that defendant was then and always since has been, &c., a British subject; never resided, &c., in the U.S.; was never subject to laws of the U.S., for or on account of said causes of action; that by the laws of Canada the plaintiffs had no right of action against the defendants,

and that the judgment of the foreign court was contrary to natural justice. Held, on demurrer, plea bad. Robinson, C.J., The Chancellor, and McLean, J., dissentientibus. Semble, per Robinson, C. J., that comity of nations does not extend so far as to render it incumbent on our courts to enforcea judgmentagainst one of their own officers, obtained in a foreign court, for an act done by him under the authority of their process, and that in such a case it is competent for our courts to stay the action on the foreign judgment, and compel the plaintiff to proceed on the original cause of ac-Per Macaulay, C. J. C. P., and Spragge, V. C.—That the fact of defendant's acting in his official capacity makes no difference, and it would not deprive the foreign court of jurisdiction, or be a reason for refusing to enforce its judgment in our courts. Semble, per Robinson, C. J.—That a writ of attachment has relation to the time of its being issued, or perhaps to the teste. Per Macaulay, C.J. J.P., Burns, J., Esten, V.C., Spragge, V.C. -That it only takes effect from the time of seizure. Per Robinson, C.J., the Chancellor, and McLean, J.—That the statements in the plea of property being in T., that the seizure was legal according to the law of Canada, &c., are positive averments of facts. Per Macaulay, C. J. C. P., and Spragge, V. C.—That they are not allegations of facts, but merely state appellant's view of the law of Upper Canada. Semble, per Spragge, V. C.—That where a foreign judgment is attempted to be enforced in the very country where the cause of action arose, it would be competent to the defendant to question the decision of the foreign court on the merits. Per McLean, J. -That when it is alleged that certain facts were offered and proved in a foreign court, it will be assumed that the proceedings were such as to ad-

mit of such proof being received. Kingsmill et al., v. Warrener et al., 18.

Appeal from C. C .- Proof of foreign judgment where the court has no seal-13 & 14 Vic. ch. 19-Pleading.]—2. Debt on a judgment rendered in an inferior court in the United States. It was proved that the court had no seal, and the judge's book was produced containing the judgment, and his handwriting and signature proved. Held, sufficient evidence of the judgment. The defendants, executors of the judgment debtor, pleaded that the testator, at the time of and for twenty years before the recovery against him, and until his death, resided only in this Province; and that the cause of action, if any, for which the judgment was obtained, arose here, and not within the jurisdiction of the foreign court; and that the said alleged cause of action did not accrue within six years before such recovery, or the commencement of Held, plea bad in subthat suit. Kerby et al. v. Elliott et al., stance. Executors, &c., 367.

FORWARDER.

See Wharfinger and Warehouse Men.

FRAUDS (STATUTE OF).

See FIXTURES.

GALT AND GUELPH R. W. CO. See Mandamus, 2.

GOODS SOLD & DELIVERED.

See Auction.

GRAND TRUNK RAILWAY.

See RAILWAY COMPANIES.

GREAT WESTERN RAILWAY COMPANY.

See Arbitration and Award, 2.

Mandamus to appoint arbitrators

—Obligation to purchase land.]—1.

Held, that the Great Western Railway Company could not be compelled to purchase land which had been enclosed by one of their engineers without the knowledge of the directors, but which they had never expressed any intention to acquire permanently. —Quære, whether, if the Company had gone to arbitration upon the value with the intention of taking the land, they could have been compelled to complete the purchase. In re Wm. Baby et al. and The Great Western Railway Co. 291.

Obstruction of highway—Excavations—Pleading—Right of action.] -2. The defendants' line crossed the highway between the plaintiff's farm and the town of London, and at the crossing a deep cutting was necessarily made. The plaintiff sued defendants, charging as the breach of duty that after a reasonable time for restoring the road had elapsed, they wrongfully and injuriously continued the said cutting, and thereby the highway had been rendered impassable, and the plaintiff had been prevented from driving along it to town, and carrying the produce of his farm, as he frequently required to do. The evidence shewed that it was impossible to construct a bridge across the cut until it was completed, and the banks shaped and dressed off. The plaintiff's own witness swore that the defendants had carried on the work with diligence; and before the trial the bridge had been completed and the use of the highway restored. *Held*, that the plaintiff could not recover. — 1st. Because it was not wrong on the defendants' part to let the cutting and excavation continue for however long a time, and that was the injury complained of; 2dly. If the declaration had complained of delay in restoring the road by a bridge, the evidence dis-

such delay had been proved, then the defendants would have been guilty of obstructing a public highway, for which they might be indicted, but the plaintiff as an individual could maintain no action. Ward v. The Great Western Railway Company, and three other cases, 315.

16 Vic. ch. 99, sec. 4.—Effect of sec. 10—Navigable stream — Pleading.] —3. The 16 Vic. ch. 99, sec. 10, saves the right of action for the whole damage suffered, where the suit is brought within six months after the injury has ceased. Held, that in this case the declaration and ninth plea (set out below, taken together, sufficiently shewed that the stream in question was a navigable stream, and capable of being used by boats for the purposes of commerce. The declaration charged defendants with obstructing the navigation of the stream by building a bridge across it. The ninth plea—after setting out the incorporation of defendants, and the powers thereby given to them to cross streams, provided that the free and uninterrupted navigation thereof should not be interfered with by the said railway —alleged that they had erected the bridge under such powers for the purposes of their railway, and thereby unavoidably a little impeded the navigation for a short time. Held, plea bad, as shewing no defence. Snure v. The Great Western Railway Co.,

been completed and the use of the highway restored. Held, that the plaintiff could not recover.—1st. Because it was not wrong on the defendants' part to let the cutting and excavation continue for however long a time, and that was the injury complained of; 2dly. If the declaration had complained of delay in restoring the road by a bridge, the evidence disproved such a charge; and, 3dly. If

not accrue within six months. The plaintiff replied that the injury sued for was a continuing damage. It was not alleged or shewn in any way, either in the declaration or plea, that the bridge was erected under the defendants' charter, or for the purposes of their railway. Held, therefore, on demurrer to the replication, that the plea was bad—Held, also, that if the defence had been properly pleaded the replication would have been good. Wismer v. The Great Western Railway Company, 383.

Limitation of actions—16 Vic. ch. 99, sec. 10, construction of.]—5. The 16 Vic. ch. 99, sec. 10, limiting the time within which suits can be brought against this railway company, applies only to actions for damages occasioned in the exercise of the powers given to the company for enabling them to construct and maintain their road, not to claims for negligence in conveying passengers. Roberts v. The Great Western Railway Company, 615.

HIGHWAY.

See Great Western Railway Co. 2.—Pleading, 9.

IDENTITY.

See EVIDENCE, 3.

INCONSISTENT VERDICT.

See New Trial, 3, 5.

INDICTMENT.
See Criminal Law.

INSURANCE.

Policy of insurance—Conditions—Waiver.]—1. One of the conditions of a policy of insurance was that no action should be brought under it

against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition, and relied upon an alleged conversation between his agent and the president of the company. Held, that the condition could not be so waived, and that such evidence was properly rejected. Held also, that the letter set out in the statement contained no evidence of a waiver of this condition. Lampkin v. The Western Assurance Company, 237.

2. Covenant on a policy of insurance, the conditions of which provided that losses should be paid in sixty days after the proof of them, and that no suit should be maintained unless commenced within twelve months next after the cause of action should accrue. Plea, that the fire took place more than twelve months before the suit commenced. Held, no defence. Lampkin v. The Western Assurance Company, 361.

INTEREST.

See MUNICIPAL CORPORATIONS, 1.

Promissory note—Several payments — Mode of computing interest. — Where various payments had been made upon a note payable with interest, not always sufficient to cover the interest due at each time of payment: Held, that the usual mode of adding the interest to the principal, deducting the payment, and charging interest on the balance, could not be adopted; but that interest could only be computed on the balance of principal remaining due at each payment. Barnum v. Turnbull, 277.

IRREGULARITY.

See Commission to Examine Witnesses.

JOINT STOCK ROAD COM-PANIES.

Right of action against R. W. Co's. for injuring their Road.]—See "Railway Companies," 7.

JUDGMENT.

See Foreign Judgment—Practice.

JUSTICES OF THE PEACE.

See Magistrates.

LANDLORD AND TENANT.

See Lease. — Notice to Quit.— Over-holding Tenant — Rent. Trespass.

LEASE.

See ESTOPPEL, 1, 3.—TRESPASS.

Lease, construction of—Terms of tenancy. Trespass to lot 10 in the town of London. The plaintiff in his replication averred that the defendant had leased the said close with the appurtenances to the plaintiff, particularly mentioned and described in the indenture (of lease) except as in the said indenture is excepted, from the 1st of November then next until the 1st of April then next, and so on from year to year thereafter, so long as the plaintiff should remain in possession of the said close and premises. The indenture when produced was a lease to the plaintiff of "that certain frame house now standing and being on lot number ten," &c., "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows, from the 1st day of November now next ensuing for and until the 1st day of April following, a period of five months," at a monthly rent of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold posses-

sion of said premises, and should remain longer than the 1st of April, he should pay at the rate of £50 per annum as rent, to be paid monthly. Held, that the replication was not supported, for that the lease was a demise till the 1st of April, with an option to the lessee to remain afterwards as a monthly tenant (not from year to year) at the rate of £50 a year; and that it was not a demise of the whole of lot 10, as alleged. McPherson v. Norris, 462.

LIBEL.

Statement as to character of school teacher—Privileged communication.]

1. A representation by the assessed inhabitants of a school section as to the character of the teacher, made with a view of obtaining redress, is a privileged communication, which it is of importance to the public to protect; and such a statement would not be the less privileged if made by mistake to the wrong quarter. Quære, whether a communication of this nature made by an inhabitant of any other part of the province would not be privileged.

McIntyre v. McBean et al., 534.

2. Where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but the plaintiff must give intrinsic evidence of actual express malice: he must also prove the statement to be false, as well as malicious; and the defendant may still make out a good defence by shewing that he had good ground to believe the statement true, and acted honestly under that persuasion. *Ibid*.

LIMITATION OF ACTIONS.

See Great Western R. W. Co., 3, 4, 5.—Insurance.

Held, that the 14 & 15 Vic. ch. 54,

sec. 8, as to limitation of actions, does not extend to corporations, McLean, J., dissenting. McKenzie v. The Mayor, Aldermen, and Commonalty of the City of Ktngston, 634.

LIMITS.
See Arrest.

LOTTERIES.
See Pleading, 4.

MAGISTRATES.

Action against justices—Form of —16 Vic. ch. 180.]—One A. went before the defendants, two justices, and swore that the plaintiff had insinuated to the agent of an insurance company that he, A., would set fire to his own building, and that from this and other circumstances he was afraid that the plaintiff would destroy his property; and he therefore prayed that he might be bound over to keep the peace; the defendants thereupon required the plaintiff to enter into a recognizance with sureties, and on his refusal, committed him to gaol. The plaintiff having sued them in trespass, Held, that the 16 Vic. ch. 180, clearly applied, and therefore only a special action on the case could be maintained. Fullarton v. Switzer et al., 576.

MAINTENANCE, (STATUTE OF).

14 & 15 Vic. ch. 7, effect of—Sale of right of entry, and pretended rights — Registry laws.] — A., the owner of certain lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds; the defendant, A.'s son and heir-atlaw, subsequently released to S., which was also recorded; the defend-

ant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff having sued the defendant for the penalty under 32 H. VIII. ch. 9, for selling a pretended right, Held, that the 14 & 15 Vic. ch. 7, would not apply in defendant's favor, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right; but held also, that by the registry of the deed to S. the conveyance to the plaintiff became fraudulent in its inception, and therefore he could not recover. Semble, that the effect of the 14 & 15 Vic. ch. 7, is to repeal the 32 H. VIII., and not merely to permit the sale of a right of entry subject to the penalty. Baby qui tam v. Watson, 531.

MALICIOUS ARREST.

See NEW TRIAL, 1.

Evidence to shew want of reasonable and probable cause.] - In an action for malicious arrest on mesne process for £93, the plaintiff proved that before such arrest he had assigned all his effects, amounting to £30,000, in trust for his creditors generally, with a proviso that dividends should be made for all, but that the sums accruing to such as had not come into the assignment should be paid to the plaintiff: that he was employed by the assignees at a salary in arranging the estate, and that defendant had knowledge of the assignment. He also proved his own general high character and standing, and that defendant had been cautioned by one witness against making the arrest. On cross-examination it appeared that plaintiff's family and connections resided out of Upper Canada: that his house had been advertised for sale a short time after the assignment; that and that the assignment had been made without previously calling a meeting of his creditors. Held, that the plaintiff had shown prima facie a want of reasonable and probable cause. and should have been allowed to go to the jury. Torrance v. Jarvis, 120.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 2.

Mutual Insurance Company.]— 1. A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment by those who had been mutual insurers with the plaintiff but no longer belonged to the company, their deposit notes having been cancelled. Plaintiff's attorney wrote on the 20th of December to the treasurer of the company, demanding a portion of the claim, and on the 21st received an answer, saying that the defendants' solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney; and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum. Held, a sufficient refusal. Hughes v. The Mutual Fire Insurance Company of the District of Newcastle, 153.

To appoint arbitrator—Nature of claims which may be arbitrated on.]-2. Applications were made, on behalf of A. and B., for a mandamus to the Fees of, while attending inquests.]— Galt and Guelph R. W. Co. to compel

4 q—vol. XIII Q. B.

them to appoint an arbitrator on their part, to determine upon the compensation due for damages in reference to certain injuries specified in the notices which had been previously served upon them. It appeared that the heads of claim made by A. were for consequential damages, chiefly from alleged omissions, and for neglect and improper conduct of the company in the construction of their work; or for alleged consequential injury to the property of the claimant, over which the railway passed. Held, that these were not proper subjects for arbitration under the statute. In B.'s case the claim was for injury occasioned by the construction of the railway upon land of which he was at the time in occupation as lessee; and a mandamuswas granted, as it was not clear that he could recover for such damages by action. In re Shade and the Galt and Guelph Railway Company, 577.

MARRIED WOMAN.

Execution of deed by.]—See "Presumption.

MEASURE OF DAMAGES. See Damages, 1, 2.

MEDICAL EVIDENCE.

It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion. Brown v. Sheppard, 178.

MEDICAL WITNESS.

See "Coroner's Inquest."

MESNE PROFITS.

See Ejectment, 2.— Overholding Tenant.

MONEY HAD AND RECEIVED. See PAYMENT, 1.

MORTGAGE.

See CHATTEL MORTGAGE—RE-PLEVIN, 2.

MUNICIPAL CORPORATIONS.

See By-Law.—Common Schools, 1, 4,

—Costs. — Limitation of Ac-

TIONS. — NOTICE OF ACTION. — PLEADING, 9.—REGISTRY BOOKS.— STATUTE LABOUR.

By-law — Rate of interest — 16 Vic. ch. 80.]—1. Municipal corporations cannot by by-law raise money at a rate of interest exceeding six per cent. Wilson and the Municipal Council of the County of Elgin, 218.

Duty of municipality to raise money on request of trustees-Mode of proceeding by trustees—13 & 14 Vic. ch. 48, secs. 24, 25, 26-16 Vic. ch. 185, sec. 1. 2. The school trustees of an incorporated village applied to the village municipality to levy a sum of money required to pay for a school site which they had contracted to purchase. The municipality refused to do so, and the trustees applied for a mandamus. It did not appear that the Trustees had appointed a secretary-treasurer, if they are empowered to do so by the 15 Vic. ch. 185, secs. 1. 6. Held, that the trustees should first have given an order to the person from whom they had agreed to purchase upon the treasurer of the municipality, and on this ground the application was re-Quære, however, whether a mandamus would have gone, independently of this objection. In re The Board of School Trustees of the Incorporated Village of Galt and the Municipality of the Village of Galt, 511.

Sale of town hall—By-laws for levying rate. -3. The municipality of a township have authority to dispose of the town hall and the site on which it stands, when they think that another situation would be more convenient. The by-law in this case provided that any money above the proceeds of the old hall, required for the erection of the new one, should be levied on the ratable property in the township, but it did not fix the amount or the rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad. In re Hawke and the Municipality of Wellesley, 636.

MUNICIPAL ELECTIONS. See Costs.

MUTUAL INSURANCE COM-PANY.

See Mandamus, 1.—Pleading, 8.

Premium notes not negotiable—Endorsement by secretary-Waiver of notice of non-payment-6 Wm. IV. ch. 18 -4 & 5 Vic. ch. 64-16 Vic. ch. 192.] —A mutual insurance company sued upon a note, alleging it to have been made by C., payable to the company or order, endorsed by them to defendant, and by defendant to them again. It was one of their ordinary premium notes, given to obtain a policy of Insurance for C., endorsed by the secretary of the company, without recourse, and specially by defendant as follows: "I hereby make myself responsible for the within,—T. M. S." It was proved that defendant, when spoken to by the secretary, had said that C. ought to pay the note, but that | lands the jury rendered a verdict for if he did not, he supposed he must. Held, that the plaintiffs could not recover upon the declaration for such notes are not negotiable, and the company cannot transfer them by endorsement. If this were otherwise--Semble, that the secretary might have endorsed the note for the company; but that the declaration of defendant could not be treated as dispensing with notice of non-payment to him. Gore District Mutual Insurance Company v. Simons, 555.

NAVIGABLE STREAM. See Great Western R, W. Co., 3.

NEGLIGENCE.

See ATTORNEY. — CARRIER — PLEAD-ING. 2.—POSTMASTER.—RAILWAY Companies, 5.—Wharfinger and WAREHOUSEMAN.

NEW TRIAL.

See Damages, 3.—Detinue.—Evi-DENCE, 3.—PATENT—SECONDARY EVIDENCE.

In Division Court, on Interpleader.] See "Criminal Law," 3.

Malicious arrest—New trial—Verdict under £20.]—1. When a verdict is under £20, and no permanent right is bound by it, the court will not be disposed to interfere. unless it appears to be clearly perverse, or the judge who tried the cause reports that he is dissatisfied. Phillips v. Hutchinson, 136.

The fact of counsel having yielded to the advice of others, and omitted to call witnesses, is no ground for a new trial; nor is the fact that one of the jurors, before the trial, had expressed an opinion against the defendant, which the defendant was aware of. Brown v. Sheppard, 178.

Sheriff.]—3. Where, in an action against a sheriff for delay in selling v. Bonter, 492,

the defendant, saying that there had been unnecessary delay, but the plaintiff had not been prejudiced by it, the court refused to interfere. Markie v. Thomas, Sheriff, &c., 321.

Slander - Words spoken at election-Excessive damages-Death ofplaintiff before return of rule nisi for new trial.]-4. The words charged were spoken with reference to plaintiff's qualification, at an election, a matter in which defendant had an interest, and on which it is of consequence to encourage freedom of discussion. The evidence was doubtful as to the sense in which they were used, and the damages large.—The court, under these circumstances granted a new trial on payment o costs. The plaintiff having died before the return of the rule nisi, it was made a condition that in the event of a second verdict for the plaintiff, judgment should be entered as if such verdict had been rendered at the time of the first trial; and that defendant should undertake not to assign error. Swan v. Clelland, 335.

Collision of steamers--Cross-actions by both owners—Verdict in favour of both—Second new trial granted.]—5. In this case, being an action for injuries caused by collision of steamers. a former verdict had been given for the plaintiff, which the court set aside as being against law and evidence. On a second trial the jury found again for the plaintiff, on evidence not differing in any material respect; and at the same assizes the defendant brought a cross-action against the plaintiff (in the Common Pleas), and obtained a verdict for the damage done to his steamer upon the same occasion. The court, under these circumstances, granted a second new trial in the first case, with costs to abide the event. Gildersleeve

6. Where the notice of trial was received by a clerk of defendant's attorney, but the attorney, on enquiring of his clerks, was told that none had been served, and neglected in consequence to prepare for his defence, the merits appearing to be doubtful, a new trial was granted. Walton et al. v. Jarvis, 616.

NOLLE PROSEQUI.

Pleading—Nolle prosequi—Effect of.]-The plaintiff declared in assumpsit on two counts, each on an agreement dated 16th Nov. 1853, to deliver timber. Breach non-delivery. fendant pleaded non-assumpsit to the whole declaration, and several other pleas to the first count, and to that count a nolle prosequi was entered. Held, that it was sufficient at the trial for the plaintiff to produce one agreement corresponding with that declared on in the second count, and that it was not necessary for him to prove one corresponding with each count. borne v. Grover, 164.

NOTICE OF ACTION.

14 & 15 Vic. ch. 54.]—1. Held, affirming Brown v. The Municipal Council of Sarnia, 11 U.C. R. 215 that corporations are not entitled to notice of action. Snook et al v. The Town Council of Brantford, 621.

2. Held, confirming Brown v. The Municipal Council of Sarnia, 11 U. C. R. 215—that the defendants being a corporation, were not entitled to notice of action. Magrath v. The Municipality of Brock, 629.

NOTICE OF NON-PAYMENT. Of Promissory Note-Waiver of.]-See, "Mutual Insurance Company."

NOTICE TO QUIT.

knowledgment of tenancy - Verbal

agreement. - Ejectment - Plaintiff claimed under a deed from T., the patentee, dated 12th April, 1853, and proved that on the 4th of April. 1854, he served defendant with a notice to give up possession on the 30th of September then next, in failure whereof "I shall require you to pay me rent of £1 per month for the same for every month wherein you may continue in possession of the same, until I recover possession of the same, by legal proceedings or otherwise." Defendant at the time of the deed to the plaintiff, and for some time previous, had been living on the lot, under a verbal agreement with J. that he should have it for several years, and had made improvements. Held, that the plaintiff must recover; that the notice was not an acknowledgement of yearly tenancy, so as to entitle defendant to six months' notice; and that the agreement with T. could have no effect. Cleland v. Kelly, 442.

OVERHOLDING TENANT.

Mesne Profits.]—A landlord proceeding against an overholding tenant under 4 Wm. IV. ch. 1, sec. 53, cannot under 14 & 15 Vic. ch. 114, sec. 12, recover mesne profits, the latter act applying only to actions of ejectment. Semble, that the court will not entertain a motion to quash the inquisition for misconduct on the part of the commissioner, but that they have power to hold him amenable for such misconduct, on an application independent of the proceedings between the landlord and tenant. Allanv. Rogers, 166.

OWNERSHIP.

Of Vessel — Evidence of.] — See EVIDENCE, 1.

PARTNERSHIP.

Ejectment-Notice to quit-Ac- See CARRIER-PAYMENT-PROMIS-SORY NOTES, 7.

PATENT.

Infringement of Patent—Residence of Patentee-Previous patent in U. S.—Immaterial issue.]—Action for infringement of a patent by the assignee. Plea, amongst others, that the patentee was not at the time of granting of the patent a resident in this province. The evidence shewed that the patentee had lived in the United States for many years before 1850, when he came to Canada, leaving his family behind him, and applied for the patent; he remained until about three weeks after it was obtained, and being unsuccessful in disposing of it, he returned to the States. where he had since continued; and where he afterwards sold his right to the plaintiff; before coming to this province he had obtained a patent for his invention, as a citizen of the United States. A verdict having been found for defendant generally, although there were other issues on which the plaintiff was clearly entitled to succeed Held, that it would be useless to grant a new trial, because although the issue taken was immaterial -the statute requiring residence only at the time of making application for the patent-yet the evidence shewed clearly that the patentee was not then a resident, and the defendant would be allowed to amend his plea. Semble per Robinson, C. J., that the inventor must also be a resident at the time when he makes the discovery. Quære as to the effect of the patentee having previously obtained a patent in the United States. Driggs v. Band et al. 642.

(PATENT (GRANTING LAND.)
See ESTATE.

PAYMENT.

Of money falling due on Sunday, when it must be made.] — See "Deed"—"Evidence," 4.

Payment made with knowledge of the facts—Not recoverable as money had and received.]—1. Defendant sold to plaintiff and M. some lumber, the quantity of which was estimated according to a measurement made by M. and defendant's son. Two notes were given for part of the purchase money, the part of which was paid by plaintiff and M., and the second by plaintiff after he and M. had dissolved partnership. It appeared that before this note was paid, and before the dissolution, M. had gone over the measurement again with defendant's son, and found a deficiency amounting to £74; and the plaintiff sued defendant for the sum as money had and received. Held, that he could not recover, for the payment was made after the deficiency was known to M., while the partnership continued, and therefore known to plaintiff. Snarr v. Small, 125.

2. Payments made to an executor desontort form no defence to an action by the rightful executor. Hunter v. Wallace, 385.

PERJURY. See Criminal Law, 3.

PLEADING.

See Accord and Satisfaction.—
Account stated.—Attorney.—
Bond.—Common Schools, 2.—
Deed. - Ejectment. — Foreign
Judgment.—Great Western R.
W. Co., 2, 3, 4,—Insurance, 2.—
Lease. — Promissory Notes. —
Railway Companies, 4, 6.—Replevin, 1.—Trespass.—Wharfinger and Warehouseman.

Duplicity — Accord and satisfaction.]—1. Assumpsit for work and labour. 4th Plea—That on, &c., an account was stated between plaintiff and defendants of the cause of action declared on, and of other cross claims by each party against the other, and on such accounting £200 was found due by defendants in respect of the said causes of action, which defendants then promised to pay; that the defendants then delivered to the plaintiff, and the plaintiff received from defendants, their agreement in writing to pay the said sum of £200, in full satisfaction and discharge thereof, and of the causes of action declared on. The fifth plea averred the accounting as before, and that it was agreed that plaintiff should draw a bill of exchange upon the defendants for the £200. to be accepted by the defendants, and received by the plaintiff in satisfaction of the £200, and that the bill was accordingly drawn, accepted and received by the plaintiff in satisfaction of the said £200. Held, on demurrer, that the plaintiff, in his replications might traverse both the accounting and the acceptance by plaintiff in satisfaction. Light v. The Woodstock and Lake Erie Railway and Harbour Company, 201.

Case for Negligence—Plea bad, as amounting to general issue.]—2. Case for negligence. The duty alleged was to keep and store certain goods safely, and deliver them to plaintiff: Breach—That defendant, not regarding his duty, negligently put them on board a vessel bound for Hamilton, on board of which they were destroyed. Plea, that defendant did deliver the goods to the plaintiff, according to his duty and retainer in that behalf, as in declaration alleged. Held bad, as amounting to the general issue. Hunter v. Borst, 210.

3. Case, for falsely returning nulla bona to a writ of Fi. Fa. after having levied the money. Plea, that the defendant in the writ had not any goods or chattels, out of which the defendant could have levied, &c. Held, on de-

murrer, plea bad. Taylor et al. v. Jarvis, 373.

Appeal from C. C.—Illegality— Lotteries—Gambling.]—4. Assumpsit on a promissory note made by A. payable to B., endorsed by B. to C., and by C. to plaintiff. The defendant A. pleaded, fifthly, that the note was given by him to the payee as part of the consideration for the purchase of a lottery ticket, contrary to the statute; and sixthly, the same defence, with the averment' that the plaintiff became the endorsee of the note with full knowledge of the circumstances. Held, reversing the decision of the court below, both pleas bad. Held, also, that neither the facts proved nor the pleadings in this case (set out in the statement), could support a defence under the statutes against gambling, and therefore that the nonsuit ordered in the court below was wrong. Wallbridge v. Becket et al., 395.

Action for running over mare— Material Averments—Statement of value.]—5. Case, against a railway company for running over and killing plaintiff's mare. The first count alleged that the mare was in the close of one W., by his leave, and that defendants neglected to fence along their line, whereby the mare strayed upon the railway. Defendants pleaded (among other pleas) that W. was not possessed of the close; and that the mare was not there by his leave.-Held, that issues taken upon these pleas were material, and necessary to be proved. The second count averred defendants' possession of their railway, and of the engine thereon, and charged that they so carelessly managed the same that the said engine ran against the plaintiff's mare, and threw the said mare unto and upon the said railway, and injured her so that she died. Held bad, on demurrer :- 1st, Because no value was stated for the mare. 2nd. Because the count implied that the mare was trespassing the railway. Connors v. The Great Western Railway Company, 401.

Trespass—Special Traverse.]— 6. Trespass, qu. cl. fr. to lot 1, second concession of Thurlow. Plea, as to so much of the declaration as charges the breaking and entering the S. E. quarter of said lot, liberum tenementum as to that part of the lot. Replication precludi non, because the trespasses sued for were committed in different parts of the close from that mentioned in the plea; without this, that the close in which, &c., in the declaration mentioned, was the freehold of defendant. Held, on demurrer, replication bad. Ross v. McConaghy and others, 444.

Trespass qu. cl. fr.—Plea of former recovery—Repugnancy in description of premises—Demurrer.]—7. Trespass qu. cl. fr. to the west-half of lot twenty-three, 3rd concession of east Gwillimbury. The defendant pleaded. by way of estoppel, a recovery in a former action of the same nature, brought by him against the plaintiff, setting out the pleadings there, from which it appeared that the declaration contained three counts, and in the first the locus in quo. was described only by metesand bounds, and by reference to visible boundaries; in the second, as the west-half of twentytwo; and in the third, as part of the west-half of twenty-three, setting it out by metes and bounds. The plea averred theidentity of the premises in that action with the close in this-Held, on demurrer, that there was no real, or apparent repugnancy in this assertion, and that the plea was good. Doan v. Richardson, 327.

Mutual Insurance Companies— Premium notes — Demurrer.] - 8. Declaration on a promissory note alpayable to the order of the Gore District Mutual Insurance Co., by them endorsed to the defendant, and by the defendant to the plaintiff. Plea, that the said Insurance Co. are the plaintiffs in this suit, and that the plaintiffs are the persons to whom said note is made payable, and who endorsed to the defendant, and are liable to him as such endorsers. The replication shewed that the note was given by C. under the statute, on his insuring certain premises with the plaintiffs, to secure the due payments of the premiums or assessments in respect of his policy. Held, on demurrer, that the replication was bad, as shewing the note not to be what the declaration would import. The Gore District Mutual Fire Insurance Company v. Simons, 560.

Pleading—Duplicity—]—9. Trespass against a municipality for breaking and entering the plaintiff's close. The defendants in their plea set out the petition of the householders for a road to be opened running across this lot, the survey and report thereon, the by-law confirming the road; that the plaintiff claimed damages for such road passing over his land, and was awarded £2 10s., which he accepted in satisfaction of such damages; and they alleged that the trespasses complained of were necessarily committed in opening and making said road in pursuance of said by-law. Held, on demurrer, that the plea was not double, and that it shewed a good defence. Magrath v. The Municipality of the Township of Brock, 629.

POSSESSION,

See Replevin 1.—Trover.

The plaintiffs, claiming under an assignment in trust for creditors, not registered, proved clearly a delivery of leged to have been made by one C., the goods; but it was shown that they had employed the assignor's clerk as their agent to keep and sell the goods in the shop, and that he had in some instances, without the plaintiff's knowledge, permitted the proceeds to be applied in payment of some small claims against the assignor, and on one occasion had paid money into the bank to his credit, that he might draw a check for it immediately, to pay a privileged claim which the plaintiffs had instructed their agent to pay: but the plaintiffs knew nothing of the deposit in the bank or of the drawing the check. It also appeared that their agent took no steps to give publicintimation of the change of possession, either directly or by removing the assignor's name as the party carrying on the business, though he made weekly returns of sales to the assignees, -and this seemed to have been done at the solicitation of the assignor, who represented to him that he hoped to make arrangements again to resume the business. It appeared, too, that the fact of any change having been made was generally unknown in the neighbourhood. Held, that upon this evidence it was properly left to the jury to say whether there was an actual and continued change of possession, and that they were warranted in finding that there was. Foster et al. v. Smith, 243.

POSTMASTER.

A postmaster is liable to the party injured for loss caused by his negligence in the transmission of letters. Carey v. Lawless, 285.

> POWER. See WILL.

PRACTICE.

See By-Law, 3, 5.—Commission to

LAW, 3.—EJECTMENT, 2.—NEW TRIAL, 4.—Nolle Prosequi.— OVERHOLDING TENANT. - PROMIS-SORY NOTES, 1.—QUO WARRANTO. -SET OFF.

Dropping defendant in declaration-Recognizance of bail-Assessment of damages.]—It is not irregular to omit in the declaration some of the parties named as defendants in the writ; and if it were, a demand for security for costs made after decla. ration served would be a waiver. A recognizance of bail to the limits is not within the statute 8 & 9 Wm. III, ch. 11; and when there is no plea, but a breach is assigned in the declaration, the plaintiff may enter final judgment without any assessment of da-McNamee v. Reilly et al. mages. 197.

PRESUMPTION.

Where the question was whether a deed by a married woman had been executed with the requisite formalities, and some evidence was given to shew that it had been acknowledged before a judge of this court.—Held, that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time. Tiffany v. McCumber, 159.

PRETENDED RIGHT.

See MAINTENANCE.

PRISONER.

See ARREST.

PROMISSORY NOTES.

See AMENDMENT.—EVIDENCE, 4,— INTEREST. - MUTUAL INSURANCE Companies. - Pleading, 4, 8.

Pleading—False Pleas.]—1. To EXAMINE WITNESSES. — CRIMINAL an action on a promissory note, pay-

able to K. or bearer, by plaintiff as I bearer against the makers, the defendants pleaded that after the making of the note, and before it became due, the plaintiff, for a valuable consideration, delivered it to certain persons to defendants unknown, who lost the said note, and the same came into the hands of the plaintiff by finding, and not by assignment or delivery for consideration, and that the said persons unknown were, and still are entitled to said note, and the money due there-Held, that the plea shewed a good defence. See the remarks of the court as to the practice of pleading false pleas. Wanzer v. Stoutenburgh et al., 184.

Pleading]—2. Plaintiff declared against L and A as endorsers of a promissory note payable to the order of L averring that the defendants duly endorsed the said note, and that A delivered the said note so endorsed to the plaintiff. Held, on demurrer, that A must be taken to be the immediate endorsee of L, and could not deny L's endorsement. Griffin v. Latimer et al., 187.

Demurrer—Initials.]—3. In avering the making or endorsement of a note it is sufficient to describe the party by the initials of his Christian names, without alleging that the making or endorsement was by such initials. Andrews v. Talbot et al., 188.

Pleading—Immaterial issue.)—4. To an action on a promissory note by endorsees against the makers and endorser, defendants pleaded, that before the note came into plaintiffs' hands it was delivered to J. H. & Sons, and by them delivered to the plaintiffs as security for certain moneys and flour to be delivered by J. H. & Sons to the plaintiffs; that after it became due, and while it was in plaintiffs' possession, J. H. & Sons and the plaintiffs had an accounting together, in which

this note was included and satisfied, and plaintiffs afterwards held it only as agents for J. H. & Sons; that while they so held it, the makers accounted with J. H. & Sons, and satisfied this note to them. The plaintiffs replied, that they received the note from the endorser; absque hoc that it was delivered by J. H. and Sons to them for the special purpose mentioned in the plea. Held, on demurrer, replication bad, as tendering an immaterial issue. Gooderham et al. v. Lawson et al., 288.

Pleading. -5. Declaration on a promissory note made by one P. payable to F. & F. or order, endorsed by them to defendant, and by defendant to the plaintiffs. Plea, that said F. & F., to whom the note was made payable, and who endorsed to defendant as alleged, are the plaintiffs, and no other persons. Replication, that at the time of making said note and endorsement by defendant, the maker was indebted to the plaintiffs, and it was thereupon agreed between them, that in consideration that the maker would procure defendant to endorse said note and become surety thereof to the plaintiffs, the plaintiffs would give time to the maker until the note matured; that the note was made in pursuance of such agreement, and defendant, for the accomodation of the maker, endorsed it to the plaintiffs, with the intention of thereby becoming surety to them as endorser; that the maker delivered the note so endorsed to the plaintiffs, who thereupon gave time to him as agreed on, and that the debt remains wholly unpaid. Held, on demurrer, replication good. Foster et al. v. Farewell, 449.

Declaration—Action brought too soon.]—6. Declaration, that defendant on the 9th of March, made his promissory note, and thereby promised to pay to the plaintiffs, six months after the date thereof, which period had elapsed before the commencement of

this suit. In the commencement of the declaration the writ was stated to have been issued on the 10th of September. Held, on demurrer, declaration bad, for the note must be presumed to have been dated on the day when it was made, and it appeared therefore that the action had been commenced before the days of grace had expired. Hill v. Lott, 463.

Duplicity and Repugnancy.]-7. Assumpsit on a promissory note for £50 by payee against makers-Plea, that the defendants were in partnership, and it was agreed that they should admit the plaintiff into their firm as a partner, on his advancing £1,000: that the defendants, in part performance of such agreement, caused alterations to be made in their store, and the plaintiff afterwards became proprietor of the same, and advanced £50 on account thereof; and to assist the defendant in making such alterations, and for securing the same to the plaintiff, defendants, on the understanding that said note was to form part of the consideration money for accepting the plaintiff as a partner according to said agreement, signed said note for the accommodation of the plaintiff, and have always been ready to receive the plaintiff as a partner on his paying the balance of said money; but the plaintiff has always refused to paysuch balance, or become a partner, or pay for the alterations made in consequence of the agreement. plea clearly bad, as setting up three defences repugnant to each other. Adams v. Forde et al., 485.

Special agreement with endorser to withdraw execution against maker—Construction of.]—8. Assumpsit against the endorser of two promissory notes made by B. Plea, that the plaintiffheld a judgment and execution against B., and it was agreed that on the endorsement of said notes by the

defendant he should discharge the said B. from all liability upon said judgment and execution, &c., which he did not do, &c. On a special case stated, it was admitted that B. arranged with the plaintiff that upon these notes being given the execution should be withdrawn; that the defendant endorsed the notes and enclosed them to the plaintiff with a letter, stating that he was informed by B. that the plaintiff held an execution against him, which the plaintiff had agreed "to discharge by his giving you the notes," that he endorsed them on that understanding, and if not so, his endorsement must be erased. The plaintiff answered acknowledging the receipt of the notes "on account of an execution against B.," and stating that further proceedings against him would be suspended during their currency, but in default of payment he should feel himself in a position to enforce execution. No further communication took place between them. These notes having been protested, the plaintiff issued an alias Fi. Fa. upon his judgment. Held, that the plea was not proved. Wightman v. Daniels, 487

QUO WARRANTO.

A county court judge cannot grant a quo warranto during term time in the superior courts. Regina ex rel. Gleeson v. Horsman, 140.

RAILWAY COMPANIES.

See Arbitration and Award.—
Great Western R. W. Co.—
Mandamus, 2.—Pleading, 5.

Grand Trunk Railway—Entry on land before filing plan—14 & 15 Vic. ch. 51, sec. 10, sub.-sec. 4.]—1. An award made under the 14 & 15 Vic. ch. 51, will not cover injuries committed by the company in entering upon lands before filing their map

and plan, when they had no legal right to enter. Jeasler v. Bell et. al., 176.

1.2. The Grand Trunk Railway Company served a notice on the plaintiff stating that they required a portion of his land, (describing it,) and their readiness to pay a certain sum "as compensation for the fee simple of the said piece of land hereinbefore described," and that in case of refusal of such sum proceedings would be taken by them to obtain a title; and also notifying him of their appointment of an arbitrator, "to act in pursuance of the provisions of the Railway Clauses Consolidation Act." The defendants, contractors under the company, entered upon the land, and commenced their work, soon after this notice. The plaintiff subsequently appointed an arbitrator, and an arbitration was held; but a few days before the award was made the plaintiff brought this action of trespass, and he afterwards refused to accept the sum awarded. Held, that the notice was sufficient to entitle the company to proceed to arbitration, both upon the price of the land and the consequential damage resulting to the plaintiff from taking it. Held, also, that neither the price nor such damage could be recovered in this action, but only the damage resulting from the entry and commencement of the work, which were premature and illegal. Qucere,whether the award need distinguish between the price of the land and the damages. Martini v. Gzowski et al., 298.

14 & 15 Vic. ch. 51, sec. 11— Notice withdrawn and not renewed— Trespass—Damages.]—3. The Grand Trunk Railway Company gave a notice to the plaintiff under 14 & 15 Vic. ch. 51, sec. 11, sub-sec. 5, of their intention to take about eleven

acres of his farm, through which their line passed. They afterwards withdrew this notice and informed the plaintiff verbally that a new notice would be given, but omitted to give it. The quantity marked on the company's map, which was duly filed, was only 2.25 acres. The defendants, contractors under the company, having entered upon this portion and constructed their railway, Held, that the plaintiff was entitled to recover damages for the loss of occupation of such portion, and for the inconvenience occasioned to him in the use of his farm by its being thus intersected, up to the commencement of this action. v. Gzorvski et al., 308.

Action against shareholäer by creditor of a R. W. Co .- Plea of payment to a Co.—14 & 15 Vic. ch. 51, sec. 17.]—4. The plaintiff, a creditor of a railway company, having had his execution returned nulla bona, sued the defendant, a shareholder, for the amount remaining unpaid upon his stock. The defendant pleaded, that before the commencement of this suit the railway company sued him for the same moneys, and that after being served with the writ of summons in that case, and before declaration in either case, and after the commencement of this suit, be paid the company in full. Held, no defence, as it was not averred that such payment was made in ignorance of the plaintiff's claim. Tyre v. Wilkes, 482.

Management of locomotives—Escape of sparks—Care required in preventing.]—5. Railway companies, in the management of their engines, are bound only to use the ordinary and regular care and appliances to prevent the escape of sparks. Any property so near the track as to be in danger, notwithstanding such precautions, remains there at the own-

er's risk; and they are not obliged to shut off steam, or take extraordinary care, in passing it. Hill v. The Ontario, Simcoe, and Huron Railroad Co., 503.

Case against R. W. Co.—Sufficiency of declaration-Pleading. -6. CASE.—The declaration stated that the plaintiff was seized of certain lands adjoining defendants' railway, which lands ought of right to be drained by ditches through defendant's lands: that defendants were using these lands for their road: yet that they negligently, unskilfully, wrongfully, and injuriously, placed earth, &c., in, upon, and across the said drains so passing through their lands, and thereby obstructed the same, whereby plaintiff's land became wet and useless, &c. Held, that a sufficient cause of action was shewn, and that the plaintiff, having obtained a verdict, was entitled to re-Alton v. The Hamilton and Toronto Railway Co., 595.

Joint-stock Road Company—Right of action against railway for injuring their road—Arbitration.]—7. A road company, incorporated under the general acts, were held entitled to maintain an action against the Hamilton and Toronto Railway Co., for neglecting to make within a reasonable time a proper bridge over their railway where it crossed the plaintiff's road. The Streetsville Plank Road Company v. The Hamilton and Toronto Railway Company, 600.

RAPE.

See Criminal Law, 1.

RECOGNIZANCE.

See Arrest—Practice.

REGISTRATION.

See Chattel Mortgage. — Maintenance.

REGISTRY BOOKS.

Registry books—Liability of County Council for—16 Vic. ch. 187, sec. 3.]—A., the registrar of Kent, applied to G., the registrar of Huron, to order books for his office: G. ordered two books from the plaintiff in A.'s name, and these were charged to A.; three others were afterwards furnished, which the plaintiff charged in his books to "The County of Kent, for Mr. A." Held, that the plaintiff had no right of action against the County Council. Read v. The Municipal Council of the County of Kent, 572.

RENT.

See Estoppel, 3.

The assignee of a reversion cannot recover rent accrued due before the assignment. Wittrock v. Hallinan, 135.

REPLEVIN.

Pleading—Right of property.]—1. Where replevin was brought against the sheriff for a seizure under execution made by his deputy. Held, that as defendant was obliged to show that the seizure was made under process in order to connect defendant with the act, it was not necessary to plead specially, but that under non cepit defendant might avail himself of the 18 Vic., ch. 118, which enacts that replevin shall not lie under such circumstances. Under an execution delivered to him on the 16th of November, the sheriff

seized on the 17th; the plaintiff, a sufficient seizure. Finn et al. v. another creditor, was then at the debtor's shop receiving delivery of some crockery which the debtor was selling him in order to satisfy his claim. These goods were proved to See Chattel Mortgage. -- Patent. have been set apart for the plaintiff, and to have been marked with his mark, and one of the articles had keen delivered to him in the name of the whole. Part had been removed, and the rest was detained and secured by the sheriff. Plaintiff having replevied — Held, that under a plea of not possessed, defendant was entitled to a verdict. Calcutt v. Ruttan, 146.

14 & 15 Vic. ch. 64-Staying proceedings. -2. C. mortgaged to the plaintiff the goods in his shop to secure payment of £125. The plaintiff having entered into possession of all C.'s stock in the shop, the greater portion of which was not there at the execution of the mortgage, C. replevied. This action on the replevin bond had been taken down to the county court, and the trial postponed.—The court, on application, ordered proceedings to be stayed on payment of the amount secured by the mortgage, with interest and costs. Hedley v. Closter

et al., 333. Evidence of seizure. 1-3. Replevin against a landlord and his bailiff for goods seized under a distress. It appeared that the bailiff had gone to the plaintiff's store, who told him to proceed and they would replevy, and they requested him to seize some barrels of spirits, which he did, and afterwards advertised them for sale in the usual manner; he did not touch the casks, or leave any one in possession, or take security for their production at the time of sale, relying, as he said, on the plaintiffs' assurance, and knowing

Morrison et al., 268.

RESIDENCE.

RIGHT OF ENTRY. See MAINTENANCE.

ROAD.

See By-LAW, 3.—FLLADING, 9.

ROAD COMPANIES.

Right of action against R. W. Cos. for injury to their road.] - See "RAILWAY COMPANIES," 7.

RULE NISI.

To quash by-law—when to be made retunable .]—See "BY-LAW," 5.

SALE OF GOODS.

See Common Counts.—Contract.— FIXTURES.—STOPPAGE IN TRAN-

Upon Credit. Form of action.]-See "Auction."

SCHOOLS.

See Common Schools.

SEAL.

See DEED.

To warrent to collect School raies. - See "Common Schools," 2.

SECONDARY EVIDENCE.

Secondary evidence of deed-When admissible.]-Semble, that under the circumstances of this case, secondary evidence of a deed in the chain of title was properly received; and the court refused to interfere, that they intended to replevy. Held, as the reception of such evidence

was not objected to at the trial. | C. J. C. P., Draper and Sullivan, J.J. Tiffany v. McCumber, 159.

SEIZIN.

Evidence of dower.] - See "Dower," 1.

SEIZURE.

Evidence of, in replevin.]—ee "Replevin," 3.

SET-OFF.

Malicious arrest—Application to set off claims.]-Two plaintiff's recovered judgment against two defendants, one of whom was afterwards arrested under a Ca. Sa., issued on an affidavit made by one of the plaintiff's. This defendant then sued the plaintiff who made the affidavit, and his attorney, and obtained a verdict against them. The attorney applied for himself and his co-derendant to set off this verdict against the judgment. Held, that the application must be refused; for the attorney, having no interest in the judgment, could not claim to have the verdict against himself paid out of it. Pentland v. Bell et al., 455.

SHERIFF.

See Arrest.—Estoppel, 2, 4.—Fi. FA.—New Trial, 2—Pleading, 3. Sheriff, how far bound by warranty of his deputy, of goods sold under Fi. Fa.]-1. In an action against the sheriff, as upon a contract of warranty, by reason of his deputy having taken upon himself, without the knowledge of the sheriff, to warrant that a horse, which he was selling under a Fi. Fa., was really the property of the debtor against whom he had the writ: Held, by Robinson, C. J., Maclean, J., Esten and Spragge, V. C. C., that the sheriff was not liable; by the Chancellor, Macaulay,

that he was. Burns J. gave no opinion. Mink v. Jarvis, 84.

2. The plaintiff, before the sale, gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land. Held, that the plaintiff had clearly no ground of action against him for so doing; and quære, whether the writing could be construed as more than an authority, and whether, if the defendant had disregarded it altogether, any action could have been maintained. Markle v. Thomas, sheriff, &c., 321.

> SHERIFF'S SALE. See Condition.—Trespass.

> > SHIPPING.

See CARRIER.—EVIDENCE, 1.

SIDE LINES. See SURVEY.

SLANDER.

See LIBEL.—NEW TRIAL. 4.

SPECIAL DEMURRER. See APPEAL.

> SPECIALITY. See DEED.

STATUTE LABOUR,

Rate of commutation. - Municipal corporations have no authority to fix the term of commutation for statute labour at a higher rate than 2s. 6d. per day. In the matter of Tilt and the Municipality of the Township of Toronto, 447.

STATUTES (CONSTRUCTION OF).

32 H. VIII. ch. 9 .- See " Maintenance (Statute of")

8 & 9 W. III. ch. 11 .- See Practice." 4 W. IV. ch. 1, sec. 53.—See "Overholding Tenant."

4 W. IV. ch. 29.—See "Great Western Railway Company."

6 W. IV. ch. 18 .- See "Mutual Insurance

Companies " 4 & 5 Vic. ch. 24, sec. 41 .- See "Crimi-

nal Law, 2. 4 & 5 Vic. ch. 24, sec. 43.—See "Crimi-

nal Law," 4. 4 & 5 Vic. ch. 64.—See "Mutual Insu

rance Companies."

10 & 11 Vic. ch. 54 .- See "Survey." 12 Vic. ch. 24.—See "Patent."

12 Vic. ch. 35 .- See "Survey." 12 Vic. ch. 75. - See " Carrier."

12 Vic. ch. 81, sec. 31.—See "Municipal Corporations," 3.

12 Vic. ch. 81, sec. 155 .- See "By-law,"

13 & 14 Vic. ch. 48, sec. 12.—See "Com-

mon Schools, 2. 13 & 14 Vic. ch. 48, sec. 18 .- See "Com-

mon Schools, 1, 3, 4. 13 & 14 Vie. ch. 48, secs. 24, 25, 26.—

See "Municipal Corporations," 2.

13 & 14 Vic. ch. 53, sec. 102.—See "Criminal Law," 3, sec. 64.—See Trover.

13 & 14 Vic. ch. 56 .- See "Coroner's Inquest."

14 & 15 Vic. ch. 7.—See "Maintenance

(Statute of)."
14 & 15 Vic. ch. 51.—See "Railway

Companies." 14 & 15 Vic. ch. 54.—See "Limitation of actions"—"Notice of action."

14 & 15 Vic. ch. 64.—See "Replevin." 2. 14 & 15 Vic. ch. 79.—See "Patent."

14 & 15 Vic. ch. 109, sec. 16.—See " By-law." 4.

14 & 15 Vic. ch. 114, sec. 12.—See "Eject-

ment"-" Overholding Tenant."
16 Vic. ch. 80.—See "By-law," 1.

16 Vic. ch. 99, sec. 4.—See "Great Western Railway Company," 3. 16 Vic. ch. 99, sec. 10 .- See "Great Wes-

tern Railway Company," 3, 4, 5.

16 Vic. ch. 175, secs. 7, 8.—See "Arrest" 16 Vic. ch. 180 .- See "Magistrates."

16 Vic. ch. 181, sec. 27.—See "Costs"— "Quo Warranto.."

16 Vic. ch. 185, sec. 1 .- See "Municipal Corporations, 2.

16 Vic. ch. 187, sec. 3.—See "Registry

Books."

I6 Vic. ch. 192 .- See "Mutual Insurance Companies."

18 Vic. ch. 83 .- See "Survey."

18 Vic. ch. 92, secs. 25, 26.—See "Criminal Law," 4.

18 Vic. ch. 118 .- See "Replevin," I.

STATUTE OF FRAUDS.

See FIXTURES.

STEAMBOAT OWNER.

Liability for goods put on board for carriage. - See CARRIER."

STOPPAGE IN TRANSITU.

A., living at Kingston, bought six cases of goods in New York, and saw them packed and leave the vender's shop on their way to the shipping warehouse. On their arrival in Kingston they were received by the officers of the customs, and placed in the Custom-house store. A. entered, and paid duty upon, and took away two of the cases; he also paid the freight and charges upon all from New York. Held, that the vendor had not lost the right of stoppage in transitu over the remaining Burt et al. v. Wilson four cases. et al., 478.

SUNDAY.

Time of payment when money falls due, under an agreement, on Sunday.] _See " Deed."

SURVEY.

11th concession of Trafalgar-Mode of ascertaining side lines— Whatis a "double-front concession"-59 Geo. III. ch. 14, secs. 2, 3, 9, 10-10 & 11 Vic. ch. 54-12 Vic. ch. 35, secs. 35, 37-18 Vic. ch. 83, sec. 9.]-The eleventh concession of Trafalgar, the last to the east, and adjoining the road allowance between Trafalgar and Toronto, is only thirty chains deep, less than half the depth of the other concessions in the same township, which are sixty-six

chains sixty-seven links. In the ori- assigned the plaintiff's interest to ginal survey posts were planted on the front or west side of this concession, to mark the lots, and also at the rear or east side, on the road between the two townships; but the lots in it were granted as broken lots, containing ninety acres, not as half lots, except lot eleven, in question, which was erroneously described as containing one hundred acres. not a double-front concession, within the meaning of the statutes; and that the side lines in it should be ascertained by running from the posts in front, parallel to the base line of the township, through to the road between the two townships, and without reference to the posts on that road. Warnock v. Cowan. 257.

TOWN HALL.

Sec MUNICIPAL CORPORATIONS.

TRESPASS.

Sez Damages, 1.—Pleading, 6, 7, 9.

Justification—Lease by defendant to plaintiff - Purchase by defendant of plaintiff's interest at sheriff's sale.]-Trespass for breaking and entering the plaintiff's house. The defendant pleaded—2. That the house was not the plaintiff's. 3. As to the breaking and entering, liberum tenementum. 4. As to the expulsion, that the house was the defendants; and the plaintiff and his family being there unlawfully, he expelled them, using no unnecessary force. Replication, that the defendant had demised the premises to the plaintiff for a term, under which the plaintiff entered; and being so in possession, the defendant expelled him. Rejoinder, that the plaintiff's interest in the premises was sold at sheriff's sale under a Fi. Fc. against his goods, and purchased by the defendant; and thereupon the sheriff by deed the defendant, and delivered possession of the premises to him; and because the plaintiff was unlawfully there at the said time when, &c., and refused to leave, the defendant ejected him, using no unnecessary force. Held, on demurrer, a good rejoinder. Stroud v. Kane, 459.

TROVER.

Possession necessary to maintain. -A bailiff seized certain goods upon an attachment issued by a magistrate under 13 & 14 Vic. ch. 53, sec. 64, and removed them to the premises of N. He afterwards made a return of what he had done to C., the ordinary bailiff of the Division Court, and signed a paper relinquishing the possession of the goods, and transferring it to C. The goods having been taken from N., held, that C. had not had such possession as would entitle him to maintain trover for them. Cool v. Mulligan et al., 613.

USURY.

See MUNICIPAL CORPORATIONS, 1.

VALUE.

Statement of, in pleading.]-See " Pleading," 5.

VENDOR AND VENDEE.

See Auction.—Contract, 1. Fix-TURES .- STOPPAGE IN TRANSITU. -TRESPASS.

WAIVER.

See By-Law, 5. - Insurance, 1.-MUTUAL INSURANCE COMPANIES. --PRACTICE.

WAREHOUSE CHARGES. See CONTRACT, 1,

WARRANTY See Sheriff.

WHARFINGER AND WARE-HOUSEMAN.

Duty of, where address on packages differs from that in abstract—Pleading.]—Certain packages were sent from New York by the Canandaigua and Niagara Falls Railway, addressed to the plaintiff at Hamilton, to go on by the Great Western Railway from the Falls. A bill of freight and charges due the Canandaigua and Niagara Falls Railway was made out to the Great Western Railway. In consequence of a telegraphic communication, of which the defendant knew nothing, the address to Hamilton entered on this bill was struck out, and Toronto substituted; and G. W. R. R. was also struck out, and E. & O. R. R. (meaning Erie and Ontario Railroad) put in its place, but the address on the packages was left unchanged. They were brought by the Erie and Ontario Railroad to Lewiston, and thence shipped to Toronto, where defendant, a wharfinger, received them, with an abstract in which they were described as addressed to plaintiff at Toronto. The defendant, relying on the address to Hamilton, which still remained on the cases, shipped them to that place, and they were burned on the passage. Held, that it was properly left to the jury to say whether the defendant was guilty of negligence in going by the address

in the abstract instead of that on the packages, and that they rightly decided in his favor. *Held* also, that the fact of the defendant being described in the declaration as a wharfinger and forwarder, and not denying either character, could not make him liable as a forwarder, in face of the evidence. *Hunter* v. *Borst*, 141.

WILL.

Construction of—Power of executors. — The testator, by his will, gave to his son John £25, " with such other provision as my executors may deem proper, and his own conduct may deserve." He then devised to his son Ronald certain lands in fee, "except, and in so far as any reservation may be made by my executors in favour of my son John. Held, that the executors took took no estate in the lands devised to Ronald, but that under the reservation they had power to convey to John a life estate in part of them. Semble, that they could not have conveyed the whole of such lands to John for life, or any part in fee. McKenzie et al. v. Grant, 180.

WITNESS.

See Coroner's Inquest,—Medical Evidence.

WORK AND LABOUR.

See Contract, 2.

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